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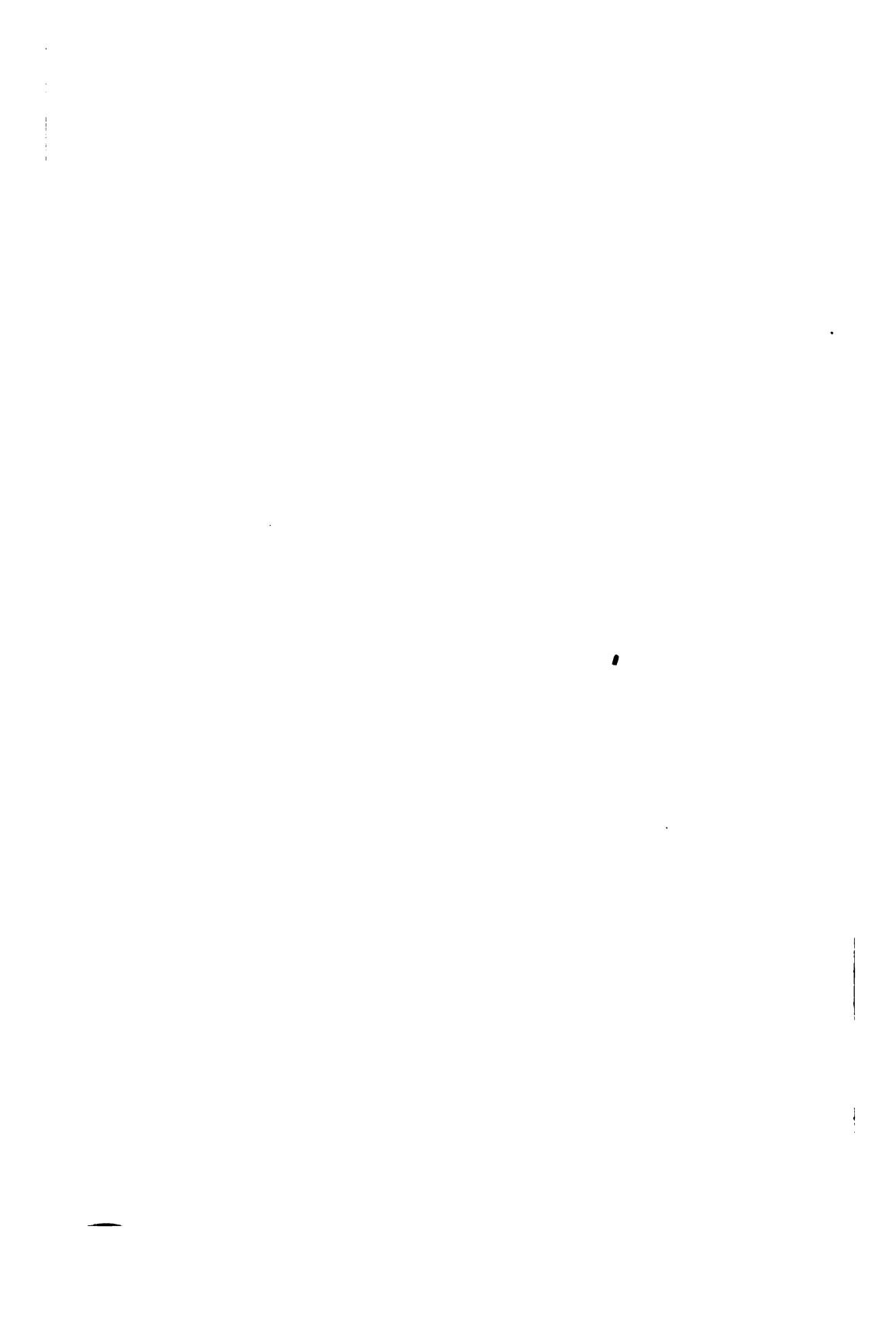
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REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

S U P R E M E C O U R T

OF THE

U N I T E D S T A T E S,

JANUARY TERM 1836.

BY RICHARD PETERS,

COUNSELLOR AT LAW, AND REPORTER OF THE SUPREME COURT OF THE UNITED STATES.

VOL. X.

THIRD EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

FREDERICK C. BRIGHITLY,

AUTHOR OF THE "FEDERAL DIGEST," ETC.

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OBITUARY.

JOHN MARSHALL, Chief Justice of the Supreme Court of the United States, died at Philadelphia, on the 6th day of July 1835. His remains were conveyed to Richmond, attended by Mr. Justice Baldwin, one of the associate justices of the supreme court, and by Mr. Sergeant, Mr. Rawle, Jun., Mr. Ingraham, and Mr. Peters, as a committee of the Philadelphia bar.

His private virtues as a man, and his public services as a patriot, are deeply inscribed in the hearts of his fellow-citizens. His extensive legal attainments, and profound, discriminating, judicial talents, are universally acknowledged. His judgments upon great and important constitutional questions, affecting the safety, the tranquillity and the permanency of the government of his beloved country—his decisions on international and general law, distinguished by their learning, integrity and accuracy, are recorded in the reports of the cases adjudged in the Supreme Court of the United States, in which he presided during a period of thirty-four years. As long as the constitution and laws shall endure and have authority, these will be respected, regarded and maintained.

January 12th, 1836.—Mr. Clay, having moved the court, in pursuance of the third resolve contained in the subjoined proceedings of the bar and officers of this court, to have said proceedings entered on the records of the court Mr. Justice Story remarked as follows :

“ The court receive with great sensibility, the resolutions of the bar, in regard to the late Chief Justice Marshall. In this tribute of affectionate respect to his memory, we most cordially unite. It contains a true, as it does an eloquent expression of feelings and sentiments, common to the whole profession. The community have sustained a severe loss, in the departure of this great and good man, who was ripe in years and full of honors. His genius, his learning, and his virtues have conferred an imperishable glory on his country, whose liberties he fought to secure, and whose institutions he labored to perpetuate. He was a patriot and statesman of spotless integrity and consummate wisdom. The science of jurisprudence will for ever acknowledge him as one of its greatest benefactors.

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The constitution of the United States owes as much to him, as to any single mind, for the foundations on which it rests, and the expositions by which it is to be maintained. But above all, he was the ornament of human nature itself, in the beautiful illustrations which his life constantly presented, of its most attractive graces and most elevated attributes. We who have been the witnesses and companions of his judicial labors, cannot but feel the desolation which has visited us. Our consolation is, that he is now beyond the reach of human infirmity, and (as we trust) in the possession of the rewards of a blessed immortality. This hall will never again be honored by his presence; but so long as it shall remain devoted to the administration of public justice, so long will it preserve the best records of his fame. He, who, in future ages, shall here seek for his monument, need but look around him and before him. The voices of the eloquent and learned, which will here pronounce his name, will never fail to breathe forth at the same time his most affecting praise.

"It is the order of the court, that the resolutions of the bar be entered upon their records. And the judges will wear crape on their left arms during the term, as a fit expression of their entire coincidence with the feelings of the bar."

Which proceedings are as follows :

"At a meeting of the members of the bar of the Supreme Court of the United States and of the officers of the court, held in the supreme courtroom, in the city of Washington, on Tuesday, the 12th day of January, A. D. 1836, Edmund J. Lee, Esq., was appointed chairman, and Walter Jones, secretary.

"On motion of Mr. Clay, the following resolutions were unanimously adopted.

"The Hon. JOHN MARSHALL, Chief Justice of the Supreme Court of the United States, having departed this life, during the late vacation of the court, and the members of this bar and the officers of this court entertaining the highest veneration for his memory, the most profound respect for his extraordinary abilities and great experience and learning as a judge, and cherishing for his many virtues, public and private, his artless character, and his uniformly amiable and unostentatious deportment, both in his public and private relations, the most lively and affectionate recollection, have resolved : That as a manifestation of their deep sense of the great loss which has been sustained in his death, by the bench, by the bar, and by the whole country, they will wear the customary badge of mourning during the residue of the term.

"Resolved, that the chairman communicate to the family of the deceased, a copy of the above resolution, and assure them of the sincere condolence of the members of the bar, and the officers of the supreme court, on account of the great and irreparable loss which has been sustained by his family and his country, in the lamented death of the late Chief Justice of the United States.

"Resolved, that in behalf of the bar and officers of this court, the

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supreme court be respectfully requested, that the foregoing resolutions may be entered on the minutes of the court."

January 14th, 1836.—Mr. Butler, Attorney-general of the United States, moved the court to receive and enter on their minutes the proceedings of the Charleston bar, in memory of the late Chief Justice Marshall. On consideration whereof, it is ordered by the court, that the said proceedings be entered on the minutes of this court, and which are as follows :

Tribute to the memory of Chief Justice Marshall.

"A meeting of the Charleston bar was held in the federal court-room, on the 17th July 1835, at one o'clock, P. M., to give expression to their feelings on the melancholy event which has deprived the supreme court of the Union, and the Union itself, of their most distinguished judicial luminary.

"On motion of Mitchell King, Esq., Thomas Lee, district judge of the United States, was called to the chair, and Robert B. Gilchrist, district-attorney, appointed secretary.

"The chairman having stated the object of the meeting, in a course of remarks expressive of his deep reverence for the pre-eminent virtues and services of the deceased ; James L. Petigrew, Esq., submitted the following preamble and resolutions.

"Death has removed from the sphere of his duties, John Marshall, the venerable Chief Justice of the United States, a magistrate endeared to his countrymen by a pure and spotless character, distinguished by pre-eminent abilities, and illustrious by his long and varied public services. The sympathy of a whole people attends the funeral of a public benefactor, whose life conferred honor on his country. But the law and the legal profession, of which he was the head and ornament, are, more than all others, interested and affected by this solemn event. His high judicial station was equally above envy and reproach ; and the honor of official dignity was enhanced and nobled by his intrinsic worth and personal merit. Though his authority as Chief Justice of the United States was protracted far beyond the ordinary term of public life, no man dared to covet his place, or express a wish to see it filled by another. Even the spirit of party respected the unsullied purity of the judge, and the fame of the chief justice has justified the wisdom of the constitution, and reconciled the jealousy of freedom to the independence of the judiciary.

"While we bow with humble resignation to the inevitable doom of humanity, we may adore the goodness of Providence that spared his life so long, to establish, by the authority of his virtues and abilities, the character of that tribunal in which he presided. His fame is indissolubly connected with the administration of justice ; nor can virtuous emulations of future judges aspire to a higher distinction than to equal the wisdom and to copy the example of Marshall.

"Resolved, that the members of the Charleston bar, in the death of Chief Justice Marshall, deeply feel the privation which the community

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have sustained, and will express their regret for his loss, and respect for his memory, by wearing crape for thirty days.

"The preamble and resolution were seconded by Mitchell King, Esq., in a feeling and eloquent address, and unanimously adopted.

"On motion of Joshua A. Toomer, Esq., seconded by William Lance, Esq.:

"Resolved, that the members of the Charleston bar will co-operate with the bar of the United States in any measure which may be deemed best adapted to the expression of their deep respect for the memory of this distinguished man.

"On motion of George Warren Cross, Esq.:

"Resolved, that a copy of the foregoing resolutions be forwarded to the nearest relative of the deceased, and that a copy be also forwarded to the Attorney-General of the United States, at Washington, with a request to present the same to the judges of the supreme court of the United States, at its next session.

"R. B. GILCHRIST, Secretary."

JUDGES
OF THE
SUPREME COURT OF THE UNITED STATES,
DURING THE PERIOD OF THESE REPORTS.

Hon. JOSEPH STORY,
" SMITH THOMPSON,
" JOHN McLEAN,
" HENRY BALDWIN,
" JAMES M. WAYNE,

} Associate Justices.

BENJAMIN F. BUTLER, Esq., Attorney-General.

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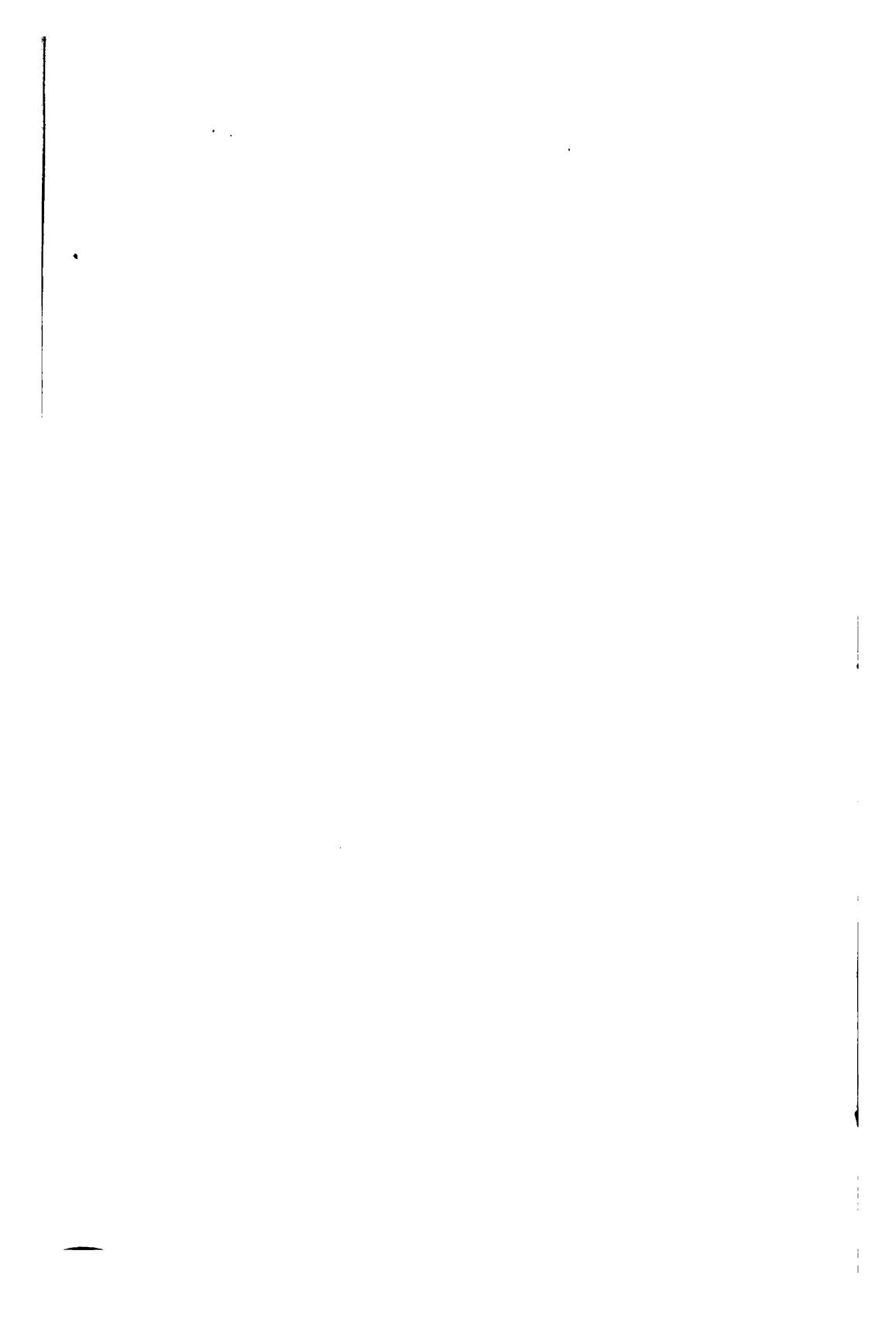
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CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1836.

JOHN DUBOIS, Lessee of OLIVER S. WOLOOTT, Plaintiff in error, v. ANDREW D. HEPBURN.

Tax-sales.—Redemption.

Construction of the fourth section of the act of assembly of Pennsylvania, passed 15th March 1815, providing for the sale of lands for taxes.

The law of Pennsylvania, authorizing the redemption of lands sold for taxes, ought to receive a liberal and benign construction, in favor of those whose estates will be otherwise divested; especially, where the time allowed is short, an ample indemnity given to the purchaser, and a penalty is imposed on the owner; the purchaser suffers no loss; he buys with full knowledge that his title cannot be absolute for two years; if it is defeated by redemption, it reverts to the lawful proprietors.

It would seem not to be necessary, for the purposes of justice, or to effectuate the objects of the law, that the right to redeem should be narrowed down by a strict construction.

It comports with the words and spirit of the law, to consider any person who has an interest in lands sold for taxes, as the owner thereof, for the purposes of redemption.

Any right, which in law or equity amounts to an ownership in the land; any right of entry upon it, to its possession or enjoyment, or any part of it, which can be deemed an estate in it; makes the person the owner, so far as it is necessary to give him the right to redeem.¹

¹ A purchaser at sheriff's sale, under a judgment against a reputed owner, has color of title, which will authorize him to redeem a tax sale. *Shearer v. Woodburn*, 10 Penn. St. 511. So, one tenant in common may redeem for himself and co-tenant. *Halsey v. Blood*, 29 Id. 819. *s. p. Maul v. Rider*, 51 Id. 377. And an agent, with power to take care of the land, may redeem a tax-sale, after the death of his constituent. *Patterson v. Brindle*, 9 Watts 98. It requires but slight evidence to redeem a tax-sale, for the owner. *Trego v. Huzzard*, 19 Penn. St. 441; *s. c. 35 Id. 9.*

But no person is entitled to redeem a tax-sale who has not some present interest; if such interest have been divested by a judicial sale, or by a conveyance, an offer to redeem by him has no effect on the tax title. *Chadwick v. Phelps*, 45 Penn. St. 105. *s. p. Cooper v. Bushley*, 72 Id. 252. A redemption by an adverse claimant will inure to the benefit of the true owner. *Orr v. Cunningham*, 4 W. & S. 294; *Laird v. Hiester*, 24 Penn. St. 452; *Phillips v. Improvement Co.*, 25 Id. 56. And see *Levick v. Brotherline*, 74 Id. 149.

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The law does not require a payment or tender; an offer and refusal is made equivalent to a receipt of the money by the treasurer; and authorizes a recovery of the land by suit, as if no sale had been made.

*²] ERROR to the Circuit Court for the Western District of Pennsylvania. The plaintiff in error instituted an ejectment for a tract of land, situated in Lycoming county, in the state of Pennsylvania; and exhibited a title, regularly deduced, under a patent granted to Joseph Fearon, dated 19th September 1796.

The title claimed by the defendant was derived from a purchase at a sale of the land, made by the treasurer of the county of Lycoming, on the 12th of June 1826, for county and road taxes, regularly assessed on the same; the county taxes, prior to the 1st of February 1825, and the road taxes, on the 22d April 1825. The whole of the land in controversy was sold for \$5.52 $\frac{1}{4}$, the alleged amount of the taxes and costs. On the 5th July 1826, the treasurer of the county conveyed the premises to the defendant.

It appeared in evidence, that the heirs and legal representatives of Joseph Fearon, the patentee of the land in controversy, were the children of Abel Fearon and Robert Fearon, and the brothers of Joseph Fearon; both brothers having died in the lifetime of the patentee; and on the 26th March 1825, partition of the real estate of Joseph Fearon was made between the two branches of the Fearon family, by which the premises in this ejectment were, *inter alia*, allotted to the heirs of Abel Fearon, in consideration of a moiety of the lands of the intestate having been allotted to the heirs of William Fearon. On the 27th March 1827, partition of the portion of the real estate allotted to the heirs of Abel Fearon, and the tract of land in controversy, became the property, by this partition, of Jacob Fox and wife, late Elizabeth Fearon, from whom the plaintiff in the ejectment held, by intermediate conveyances, the premises in controversy, in fee-simple. The plaintiff, in order to overthrow the alleged tax title set up by the defendant, gave in evidence an alleged redemption of the said tract, No. 5615, by a tender, both to the county treasury and the defendant, within two years after the said sale, of the full amount of the said taxes and costs, and twenty-five per centum upon the aggregate amount thereof, as called for by law.

*³] *The case came on for trial by a jury, at January term 1833, and the plaintiff's counsel requested the court to instruct the jury—

1. That under the act directing the mode of selling unseated lands for taxes, and its several amendments and supplements, any person may legally pay the taxes due on such land.

2. That any man who may legally pay such taxes, may legally redeem such land sold for taxes, within the term specified in said acts.

3. That any person has a right to redeem such land so sold, by a payment of the tax, costs and per-centage, within the time named in the said acts.

4. That any person having or believing himself to have an interest in the lands so sold, has a right to redeem the same, within the period named in the said act.

5. That any person connected by blood, or by title, with the owner or supposed owner of the lands so sold, has a right so to redeem the same.

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6. That any person having the charge of such lands from the owner, during his life, after his decease, intestate, and without a countermand of such charge, has a right to redeem such lands so sold.

7. That the treasurer, under the said acts, is an officer ministerial, and not judicial, and that he is bound to receive, under the above acts, the redemption money for the land so sold, under the facts severally above set forth.

8. That the treasurer has no authority to decide in whom the title or ownership of such lands so sold and offered to be redeemed, is vested.

9. That the refusal of said treasurer to receive the redemption-money for lands so sold, is equivalent to, and dispenses with, a tender of the same.

10. That if the plaintiff, Oliver S. Wolcott, and the defendant, Andrew D. Hepburn, were citizens of different states, at the time of the action brought, that is to say, that Andrew D. Hepburn was a citizen of Pennsylvania, and Oliver S. Wolcott was a citizen of Connecticut, or of any other state of the United States, the jurisdiction of this court attached; and that such *jurisdiction was not divested by any change of citizenship [*4 or domicil by the said Oliver S. Wolcott, after the institution of this suit.

11. That a citizen of the United States, born in the state of Connecticut, who resided, until his marriage, and settled there, upon his marriage, gained thereby a citizenship and domicil by origin; which is not divested or changed, unless there be proved a citizenship and domicil acquired by the said Oliver S. Wolcott elsewhere, in some other state or jurisdiction.

12. That any person holding an interest in land, as tenant in common, on which taxes have been previously assessed and are unpaid, has a right to redeem the said land from a sale for said taxes, within two years thereafter, although he has been divested of his interest in said land, by a partition, after said assessment, and before the sale for taxes.

The court, on the points presented by the counsel for the plaintiff, gave the following answers:

1. The law is as here stated. Any person may legally pay the taxes assessed on unseated lands, under the several acts of assembly of this commonwealth directing the mode of selling unseated lands for taxes.

2 and 3. But no one has a right to redeem such land so sold, but the owner or owners, his, her or their agent or attorney.

4. Any person having an interest in land so sold, has a right to redeem the same, within the period named in the said act, but a mere opinion, without right, of having an interest, confers no powers to redeem.

5. Any person connected by title with the owner, or supposed owner of the land so sold, has a right to redeem the same, but the right does *not* exist in a relation by blood, because of that relationship.

6. The decease of a person, intestate, being the owner of such lands is a revocation of the authority of one who had the charge of them from the deceased, yet, under some circumstances, he may redeem lands so sold, which were under his charge, notwithstanding the decease of the owner intestate. But where the owner was of full age, and had actual notice, as in this case, from the county treasurer, of the sale of the land for taxes, and [*5 of the *name of the purchaser, and of the time within which he had

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power to redeem, and disavows any agency, and declares he will incur all risk, the interference of another person to redeem, not asserting any authority from the owner to do so, would not affect the title of the purchaser of land so sold.

7 and 8. It is true, that the treasurer, under the acts referred to, is a ministerial and not a judicial officer, but the said acts did not bind him to receive the redemption-money for the land so sold, under the facts severally above set forth. The decision of the county treasurer cannot affect the legal rights, either of the owner or purchaser, and he has no authority to determine in whom the title or ownership of such land so sold and offered to be redeemed is vested. But before he receives the redemption-money, it is his duty to satisfy himself, that the person tendering it is either owner, or agent or attorney for the owner.

9. If lands are so sold, and a county treasurer refuse to receive the redemption-money from a person duly authorized to tender it, it is not necessary to make an actual tender of it.

10 and 11. In substance, these instructions have already been given to the jury, but I repeat them in the language of the plaintiff's counsel.

12. The court instruct you on this point, as requested by the plaintiff's counsel. Its application, however, to the case before you must be tested by the facts connected with it, and given in evidence. The county tax, for which in part the land in question was sold, was assessed prior to the 26th of March 1825, the date of the deed of partition to which Robert Quay is a party. But it appears, from the certificate of the supervisor of roads, that the assessment of the road tax on the land in dispute, was made the 22d of April 1825, and filed in the proper office, the 3d of May following, after Robert Quay and wife had parted with all their interest in the land. And by the act of assembly for the sale of unseated lands for taxes, unseated land may be sold for any part of the taxes due. This land being, therefore, sold for the average of taxes, as well as for the assessment made before the execution of the deed of partition, Robert Quay could have no legal right, derived from his having been once part-owner of it, to tender all the taxes due for the purpose of redemption.

*6] *The defendant's counsel requested the court to instruct the jury as follows :

1. That if, from the testimony disclosed, they believe that Oliver S. Wolcott was not a citizen of the state of Connecticut, on the 22d September 1830, but had lost his domicil then, the plaintiff cannot recover.

2. That from the testimony disclosed, the taxes for which the land was sold were assessed, and that the deed from the treasurer to the defendant, on the face of it, vests in him a complete title to the land in controversy.

3. That under the fourth section of the act of the 13th of March 1815, when lands have been sold for taxes, none but the owner or his agent duly authorized can redeem the land ; and any offer made by a stranger, and without authority from the owner, to redeem lands so sold, would not affect the title of the purchaser at treasurer's sale.

4. That if the jury believe the testimony of Joseph F. Quay, of Robert Quay, sen., and Robert Quay, jun., they were neither of them the agent of Jacob Fox, under whom the plaintiff claims, when Robert Quay, jun., called

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upon William Harris, the treasurer, in May 1828, to attempt to redeem the tract of land in dispute ; therefore, plaintiff cannot recover.

That if the jury believe the testimony of William Harris, and what he has testified to, in relation to the declarations of Jacob Fox, when he saw him in Philadelphia, in March 1828, and in Williamsport, October 1828, neither of said Quays was the agent of Jacob Fox, nor can the plaintiff set up their acts now, to defeat the defendant's title.

6. That if the jury believe that the Quays made the offer to redeem, through Robert Quay, jun., for their own benefit, all the acts of Robert Quay, jun., in relation to the redemption, are void, as it regards the present defendant, and do not destroy his treasurer's title.

7. That if the jury believe that Robert Quay made the offer to redeem, under a mistaken supposition that he was the owner, or had an interest therein, and when he discovered the mistake, disclaimed any further act, such offer to redeem cannot affect the title of the defendant as purchaser at treasurer's sale.

*The court gave the following answer to the defendant's points : [*7
"That if it should appear from the testimony, that Oliver S. Wolcott, lessee of the plaintiff, was a citizen, and domiciled in the state of Pennsylvania, on the 25th September 1830, when this suit was brought, this court has no jurisdiction," and the plaintiff cannot recover.

The jury found a verdict for the defendant, and judgment having been entered on the same, the plaintiff prosecuted this writ of error.

The case was argued at January term 1835, by *Tilghman* and *Anthony*, for the plaintiff ; and by *Jones*, for the defendant ; and held under advisement to the present term.

Tilghman and *Anthony*, for the plaintiff, contended—1. That within two years after the sale of unseated lands, in Pennsylvania, for taxes, any one has a right to redeem the same for the owner, by the payment of the tax, costs and percentage. 2. That Robert Quay, Esq., having been the agent of Joseph Fearon, the intestate, during his life, and being a tenant in common, in fee, together with others, of this tract, No. 5615, on the 1st day of February 1825, when the county tax was assessed, for which it was sold on the 12th day of June 1826, had a right to redeem the said tract ; although it was, at the same time, sold for a road tax, assessed subsequent to the partition made on the 26th March 1825. 3. That the court below erred in the answers given to the second, third, fourth, fifth, sixth, seventh, eighth and twelfth points submitted.

The counsel for the plaintiff in error stated, that the validity of the treasurer's sale would not now be contested ; and that the only question which would be raised was, whether there was a legal redemption of the tract, agreeable to the provisions of the several acts regulating the sale of unseated lands for taxes.

It was admitted, on the argument in the court below, and laid down as law by the judge, that any person, owner or not, may pay the taxes due on unseated lands ; and it is evident, that the main scope and objects of the act of March 1815, were, to adopt *such provisions as would compel [*8 the regular payment of the taxes ; hence, if any person paid them, it prevented a sale. But it will be urged on the part of the defendant in

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error, that, after the sale, the situation of things is changed ; and that the purchaser acquires a right, which can only be defeated by the owner, or some one authorized by him. To this, it may be answered, that, by the fourth section of the act of 1815, twenty-five per cent., is allowed to the purchaser, as a sufficient compensation for the use of his money, if refunded within two years ; and it is of no importance to the county, who redeems ; nor has the purchaser a right to complain, if he receives his money and twenty-five per cent. additional.

It was, however, contended below, and so held by the judge, that the act of assembly expressly confines the power of redemption to the owner ; and that he alone, his agent or attorney, possesses the right. The fourth section says, "if the owner or owners of land, sold as aforesaid, shall make, or cause to be made, an offer, &c., to the treasurer, within two years after sale ; or in case the owner or owners of lands so sold shall have paid the taxes due on them, then, and in either of these cases, said owner or owners shall be entitled to recover the same by due course of law." There is no distinction between the owner's paying taxes, and the owner redeeming, after sale. In either case, he is not entitled to recover the land, unless he shows that the owner or owners have tendered the redemption money, or have paid the taxes, as the case may be ; yet the court below instructed the jury, that any person had a right to pay the taxes, notwithstanding the positive restriction, in the act, to the owner ; and universal usage, ever since the law was enacted, has been for a friend, a neighbor, a stranger, as well as the owner, to pay taxes.

An objection is made to a redemption by a stranger, because it may be against the will of the owner ; as he is entitled to the surplus money arising from the sale, after payment of taxes and costs. The same reason would operate, if a stranger should volunteer to pay the taxes ; because he would as effectually prevent all the imaginary benefits to result from a treasurer's sale, by paying the taxes, as if he redeemed the land, after sale. He who
*9] *redeems, acquires no more right or title to the land than he who
pays the taxes ; he performs a mere act of friendship or generosity, which accrues to the benefit of the owner, and unless he expressly disavows the redemption, it ought to be considered valid.

In *Wilt v. Franklin*, 1 Binu. 502, it was held, "that, where a deed is for the benefit of the grantee, it is reasonable, that his assent should be presumed." "The assent of the party that takes, is implied in all conveyances, by intendment of law, till the contrary appears ; and is as strong as the expression of the party. *Stabit presumptio, donec probetur in contrarium.*" Ibid. 519. And again, page 520, "Why should there be a previous consent of the *cestuis que trust*, if they consent afterwards ? On legal principles, the acceptance will refer back to the execution of the deed, and form one transaction, done at the same time." In *Brown v. Dysinger*, 1 Rawle 408, it was held, that "a tender of money in behalf of an infant, made by his uncle, the father being dead, but the mother living, was good ; although the uncle had not then been appointed guardian." In that case, the tender was made to defeat an estate, held by the party to whom the tender was made ; and although, at the time of the tender, the uncle merely acted in the capacity of a friend to the minor (*quasi a stranger*), yet the court say (page 415), "we think an infant ought not to lose his inheritance,

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merely because he has no guardian ; his uncle or next friend may act for him ; he did so here ; the tender by him was well made."

The case of *McBride v. Hoey*, 2 Watts 436, however, is said to have decided the very question now before the court, and must be taken as authority. To this it may be answered that, in 1 P. & W. 54, the same cause was before the supreme court of Pennsylvania, and it was then decided, that the holder of a deed, under a United States' sale for the payment of direct tax, had such a right as would authorize him to redeem the same lands from a person who had purchased them at the treasurer's sale for taxes, made in pursuance of the act of assembly. The question appears to have been fully argued, from the two reports of the case, and yet the court came to different *conclusions. The last decision, therefore, cannot be considered as binding authority on this court. "Until [*10 there shall be a fixed and received construction of the state laws, in their own courts, they are not to be regarded as the rule of decision in the federal courts." 11 Wheat. 361; 1 Pet. 441; 5 Cranch 22. Although *McBride v. Hoey*, from what has been stated, cannot be considered as authority ; let us examine the reasoning of the learned judge, who delivered the opinion of the court, in 2 Watts. He says, "no one but the owner at the time of the sale, his heirs, assigns, or other legal representatives, have the right to receive the surplus money due on the land ;" and consequently, no other has the power and capacity to redeem. That if a stranger could redeem, the purchaser's title would be set aside ; and the owner afterwards refusing to take back the title, might compel him to pay the amount of his surplus bond. To this, a conclusive answer may be given here, that, in the present case, the reasoning does not apply ; there was no surplus bond, as the land sold for \$5.50 only, being the amount of one year's taxes and costs. "Cessante ratione cessat ipsa lex."

The object of the law was the collection of taxes—the mode of sale and redemption was accessory and incidental to that object. The land, by non-payment of taxes, was liable to be sold ; and although the act requires the owner to pay the taxes, before sale, and to redeem the land, after sale ; yet it is next to impossible for the county treasurer to know who is the real owner. The first section of the act of 1815 directs the treasurer "to advertise the number of acres in each tract, and the names of the warrantees or owners thereof :" yet so little does the treasurer know about the owners, that the millions of acres advertised every year are universally published by their warrantee names, and not the owner's. The records of the office give no satisfactory information as to the owner ; by alienation, death, &c., he may be changed every year. When the land is sold, the purchaser holds it for two years, subject to redemption, and receives as a compensation, twenty-five per cent. on the amount paid by him to the treasurer, if redeemed ; but if not redeemed, his title is good. The owner *would have no right to complain, because he is placed in the same situation by the redemption, that he was in before the sale. The law [*11 never contemplated a speculation on the owner, on a forced sale of his land ; nor would it aid him to take advantage of his own *laches*, if any person should volunteer to redeem the land for him.

But suppose, the owner was dissatisfied with the redemption ; he might disavow it, before the purchaser receives back his money and per-cent-age ;

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and instead of the purchaser's title being "set aside," it would be confirmed. It is urged by the counsel, in *McBride v. Hoey*, and reiterated by the judge, that, "by the act of 1815, the right of redemption is given to the owners, and they alone are authorized to do it, or cause it to be done; that they can, in no other case, maintain ejectment, except when they shall have paid the taxes due on it, previously to the treasurer's sale." As has been observed, there is no substantial distinction in the phraseology of the two parts of the section; the payment of taxes must have been by the owner, before sale, if he would recover the land sold, as well as the redemption, must have been by the owner, after the sale; if there be a distinction, it is in favor of redemption; for if the owner of land sold for taxes shall make, or cause to be made, a tender, &c., within two years after sale, it is sufficient: but if the owner would recover because he had paid the taxes due, previously to the sale, he must show that he paid them himself, not that he ever caused it to be done.

The judge, however, admits that a stranger may redeem, without the knowledge or authority of the owner; and that if he afterwards, within the two years, approve of and adopt it, it would be good. His admission is altogether adverse to the answer of the district judge to the seventh and eighth points of plaintiff's counsel, "that, before the treasurer receives the redemption money, it is his duty to satisfy himself that the person tendering it is either owner or agent, or attorney for the owner." If the owner's approbation be sufficient, after the redemption, at any time within the two years; then the treasurer has no right to inquire by what authority any one offers to redeem; as the owner may, the next day, ratify the redemption by a perfect stranger.

*12] The error of the conclusion to which the learned judge of the supreme court of Pennsylvania arrived, as is conceived, consists in this, that the sale vested the purchaser of a legal estate in the land, instead of an incumbrance in the nature of a mortgage; hence, he asserts, that "until the owner approves of the redemption, the purchaser at the treasurer's sale cannot be considered as divested of his estate in the land." *McBride v. Hoey*, 2 Watts 443.

In form, a mortgage is certainly a conveyance; but it is, unquestionably, treated, at law, in Pennsylvania, in the way it is treated in equity elsewhere, as a bare incumbrance and the accessory of a debt. As between the parties, it is a conveyance, so far as is necessary to enforce it as a security. As regards third persons, the mortgagor is the owner, even of the legal estate. *Presbyterian Corporation v. Wallace*, 3 Rawle 128. An ejectment may be supported on a mortgage. 12 S. & R. 240. It is a lien and something more. 1 Pet. 441. Although the words grant, bargain and sell, are in a mortgage, and all the forms of an absolute conveyance in fee are used, with a proviso that payment on a certain day shall alone render it null and void; yet, as Judge HUSTON said, in *Presbyterian Corporation v. Wallace*: "No lawyer, no man, no woman, can be mistaken in its import. It is what the law and the universal understanding of all people make it," viz., a security for the payment of money. The words of the mortgage require the debtor to pay, or cause to be paid, the money for which the land is mortgaged, on or before a certain day, to redeem it from the mortgage; yet, if anybody—mortgagor, friend or stranger—pay the mortgage-money, on or before, or after the day, it is all-

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sufficient to redeem the land. A treasurer's deed conveys the tract sold to the purchaser. The law gives the owner two years to pay, or cause to be paid, the redemption money. A stranger, within the limited period, pays the purchase-money and per-cent-age, the owner not knowing anything about it. Will not his subsequent assent, even after the two years have elapsed, relate to the time of redemption; and as in the case of a mortgage, be considered for his benefit, and his approbation presumed? *Will v. Franklin*, 1 Binn. 502.

If the court should, however, be of opinion, that some interest *in the land is necessary, to authorize a person to redeem, it will then be [*13 proper to inquire, whether the redemption by Robert Quay be good, under the circumstances of this case.

The counsel for the plaintiff in error then briefly recapitulated the facts, showing that, originally, this tract of land, with many others, belonged to a certain Joseph Fearon, of Philadelphia, who died intestate, in April 1810; that these lands descended to his brother's children, of whom Sarah, wife of Robert Quay, was one; that some of the heirs lived in England. Quay lived in the vicinity of this land; it was understood, that he should look after it, and his son Joseph had letters of attorney from the heirs in England, to prevent waste and destruction of the timber; that, during the lifetime of Joseph Fearon, Quay was allowed the use of the property in his neighborhood, and cultivated it, after his death. James Fearon, administrator of Joseph Fearon, had paid the taxes. On the 1st of February 1825, the assessor of the proper township returned to the office of the county commissioners, that he had assessed a county tax of 95 cents on this tract, No. 5615, of 254 acres; and on the 29th of April 1825, the supervisors of roads and assessor certified, that they had fairly assessed a road tax on said tract, of \$1.20, which was filed in the county commissioner's office, the 3d of May 1825. On the 12th of June 1826, this tract was sold by the county treasurer for one year's taxes of \$1.90, and purchased by A. D. Hepburn, for the taxes and costs of sale, \$5.12. The treasurer's deed was regularly made and delivered to him.

In the months of March and April 1825, a deed of partition among the heirs was executed, by which the tract in controversy was allotted to the heirs of Abel Fearon, to which Robert Quay and wife belonged; released all their estate, interest, &c., in said tract of land, and warranted the same against them and their heirs. This deed was recorded on 26th May 1825, and information could not have reached England till June or July. On the 13th of November 1827 (seventeen months after the sale for taxes), a partition was made by the heirs of Abel Fearon, and the tract in controversy was allotted to Jacob Fox and wife, in right of his wife, who did not know that it had been sold for *taxes. He had only been in the United States about two months, and was not acquainted with the land titles [*14 of Pennsylvania.

Previous to the expiration of the two years allowed for redemption, Mr. Fox was informed of the sale, but he neglected to redeem the tract. In May 1828, however, before the two years had expired, Robert Quay, one of the parties to the deed of partition, sent by his son to the county treasurer, with a written authority to redeem this tract. He went to the treasurer, told him he had come to redeem it, and showed his authority. The treasurer

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refused to receive the redemption money. He then went to the purchaser and offered him the money, and he refused to take it. Neither Mr. Fox nor his wife knew of Quay's offer to redeem, till the two years had expired.

The counsel for the plaintiff in error also contended, that in every partition there is a warranty that the land is free from incumbrance, and that the county tax assessed previous to the partition, as well as the road tax assessed before the deed was delivered to the grantees, were an incumbrance or lien on the land conveyed. "If there be three or four coparceners, &c., which make partition between them, if the part of the one parcener be defeated by lawful entry, she may enter and occupy the other land, with all the other parceners, and compel them to make new partition between them of the other land. Co. Litt. 174 c. Every partition and exchange implies in it, and has annexed to it, a special warranty in law. 7 Bac. Abr. 231. Taxes on unseated lands have never been considered a charge on the person of the owner. The mode of recovery is by a sale of the land. *Burd v. Ramsay*, 9 S. & R. 109, 114.

They also urged, that at the time the taxes were assessed and due, Quay was a tenant in common, in right of his wife, of the lands subsequently sold; and that, if before the sale, their title was divested by the partition, yet as the taxes were a lien on the land, it was Quay's duty to remove the incumbrance and prevent a forfeiture; otherwise, Fox and wife might compel a new partition. The wife of Fox, being a *feme covert*, could do no act herself, to prevent a forfeiture; and as the husband was reaping no benefit from *15] the land, if her relations would not interfere on her behalf, the husband could, in all cases, have the wife's lands sold for taxes, without her consent, and her inheritance be destroyed, without remedy, by his neglect or refusal to redeem them. The act of assembly, which provides, that the conveyance of lands by a *feme covert*, shall be voluntary, separate and apart from, and without any coercion or compulsion of her husband, would be a dead letter as to unseated lands; as he could always avoid this provision, intended for the security of married women, by suffering a sale, relieving himself from the payment of taxes, pocketing the money, and refusing to redeem. Justice, therefore, required that Quay, who was a cousin of Mrs. Fox, by marriage, should redeem the land for her. When the supreme court of Pennsylvania, in the case of *McBride v. Hoey*, determined that none but the owner could redeem, they did not define who should be considered as the owner.

The mortgagor and mortgagee would both be considered owners, as the one has a legal and the other an equitable interest in the land. A son for a father; an agent for his principal; a vendor and vendee, where part of the purchase-money is paid; a reversioner or remainder-man, where the tenant for life refused; a stranger, if recognised by the owner within the two years; a previous owner, who sold with a warranty, when taxes were due and unpaid, might redeem; though not the owner at the time of sale or redemption. The conclusion to which the learned judge arrives in *McBride v. Hoey* is, that an interest of some kind in the property is necessary; and if the court believe that Quay had any interest whatever, at the time of assessment, or would be injured by the confirmation of the sale; it was his duty to redeem.

In conclusion, they remarked, that the court would construe the law

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liberally in favor of the land-holder, as the purchaser was abundantly compensated for the use of his money; and every principle of justice would seem to sanction the construction, that if the redemption money was paid for the owner, before the expiration of the two years, the title of the purchaser was thereby divested, and the requirements of the law fulfilled.

**Jones*, for the defendant in error.—The title of Hepburn was complete, in the year 1825, and the offer, in a legal form, to redeem, was made two years after that period. The object of the different statutes in the state of Pennsylvania, on the subject of taxes on unseated or unimproved lands, and of the decisions of the courts under these statutes, has been to enforce and secure the payment of these taxes. Having, in most cases, no owner of such lands, resident in the counties in which such lands are situated, the proceedings for their collection are necessarily against the lands; and the non-payment of the taxes, within certain fixed periods, is attended with heavy penalties. If redeemed, before two years after the sale for taxes, a large additional sum is to be paid; if not redeemed, the title becomes complete in the purchaser at the tax-sale. The decisions of the courts of Pennsylvania on this subject will be found in 18 Serg. & Rawle 360, 373 and 208; 1 P. & W. 499; 7 Serg. & Rawle 392; 10 Ibid. 254; 2 P. & W. 502.

The whole of the points made in the case may be reduced to two: all of them, except that presented in the 12th point, turn upon the question, whether a stranger can redeem land sold for taxes; and whether Robert Quay stood in any relation to the owner of the land, which would authorize him to redeem it, for the benefit of the owner.

It was clearly the intention of the legislature, to make tax-sales conclusive as to title in the purchasers at such sales. No considerations of hardship can be taken into estimate; and no such consideration can have any influence in a case of this description. The system has been formed by express provision of law. If rules and regulations must be conformed to, every means of giving notice is directed by law. Among these regulations is that under which the claim of the plaintiff is resisted—it is expressly provided, that no one but the actual owner of the land can redeem the land, after it has been sold for taxes. If Robert Quay was the owner, or the legal representative of the owner, he might redeem; but he was neither, and his offer to redeem was made without the knowledge of Fox and wife, to whom the land then *belonged. Fox disavowed the agency of Robert Quay, and charged him with improperly interfering in the redemption; saying, he would attend to it himself, but he did not.

It is denied, that by the operation of the partition, all the legal representatives of Joseph Fearon had an interest in the land held by Fox and wife, in consequence of the effect of a loss of the property allotted to Fox and wife, by reason of the lien of the taxes, for which the same was sold by the county treasurer. There is no clause of warranty in the partition deed. But, admitting there was a tenancy in common in the whole lands which descended from Joseph Fearon, it is denied, that a tax assessed and unpaid, before partition, and the effect of which would be to take from any of the co-tenants the property assigned to him on a partition, would give any right over, against a co-tenant. All the lands had been subjected to

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taxation, before the division, and therefore, no inequality of title existed to this property. A tax is not an incumbrance which is saved by a warranty, or the other usual covenants in a deed. There is no implied warranty in a deed of partition, except among coparceners. 4 Cruise Dig. Art. 16, 17; Ibid. 434.

BALDWIN, Justice, delivered the opinion of the court.—The land in controversy was granted to Joseph Fearon, by the commonwealth of Pennsylvania, by patent bearing date the 19th April 1794, from whom the plaintiff deduced a regular chain of title to himself. The defendant claimed in virtue of a sale for taxes, on the 12th June 1826, by the treasurer of Lycoming county; who, by his deed, dated 15th July 1826, conveyed the land to the defendant.

No question arose in the court below, as to the original title of the plaintiff, or the regularity of the sale for taxes; the case turned upon the redemption of the land, pursuant to the fourth section of the law of Pennsylvania, passed 15th March 1815, providing for the sale of lands for taxes. This section is as follows: “If the owner or owners of land, sold as aforesaid, shall make, or cause to be made, within two years after such sale, an offer *18] or legal tender of the amount of the taxes for which the said *lands were sold, and the costs, together with the additional sum of twenty-five per cent. on the same, to the county treasurer, who is hereby authorized and required to receive and receipt for the same, and to pay it over to the said purchaser, on demand; and if it shall be refused by the said treasurer, or in case the owner or owners of lands so sold shall have paid the taxes due on them, previously to the sale, then, and in either of these cases, said owner or owners shall be entitled to recover the same by a due course of law, but in no other case, and on no other plea, shall an action be sustained.

It appears by the record, that before the 1st February 1825, this land was assessed for county tax, ninety cents, and on the 22d April 1825, with road tax, one dollar and twenty cents; it was sold in June 1826, for five dollars and fifty-two cents, the amount of taxes and costs, and purchased by the defendant; that in May 1828, Robert Quay gave his son written directions to pay the county treasurer the taxes and costs for which the land was sold, together with the addition of twenty-five per cent.; whereupon, the son offered to pay the same to the treasurer, who refused to accept it, on the ground, that his father was not the owner, and was not authorized to redeem the land; on a similar offer made to the defendant, he also refused, for the same reason. No formal tender was made, nor any specific sum offered; but the son had a sufficient sum with him to pay all that was by law necessary to pay, and offered to pay it.

At this time, the title to the land was in this situation: Joseph Fearon, the patentee, died in 1810, intestate, and without issue, seized of the land in controversy, together with a number of other tracts of land in the same part of the country; he had two brothers, Abel and William, who died in his lifetime, leaving issue, to whom the estate of their uncle descended in equal shares. The children of Abel Fearon were Robert, Joseph, Sarah and Elizabeth; Sarah married Christopher Scarrow, and resided in England; Elizabeth married Jacob Fox, in England, in 1812; where they resided till 1827, when they removed to Philadelphia; where Robert and Joseph resided,

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and where Fox and wife continued to reside. The children of William Fearon were John, William, Nancy, married to Samuel Brown, living in Centre county, James, residing in Philadelphia, and Sarah, married to Robert Quay, residing in Lycoming county, in which the land in question is situated. James Fearon was the administrator of his uncle Joseph, and paid some taxes on the unseated lands of which he died seised. It was understood, that those heirs who, from their situation, could most conveniently do it, should look after the unseated lands in their neighborhood; but no definite arrangement seems to have been made for the payment of the taxes due on the lands.

The lands remained undivided, or so far as appears, without any attempt at partition by the heirs, till the 26th March 1825; when Robert Quay and wife, Samuel Brown and wife, James and William Fearon (who survived their brother John), the children of William Fearon, executed a deed of partition to Joseph Fearon, Elizabeth Fearon, Christopher Scarrow and Sarah his wife, the children of Abel, the consideration of which is thus expressed: "For and in consideration of a quantity of land estimated in value equal to that hereinafter described, to be conveyed by a like release executed by the heirs and legal representatives of Abel Fearon, deceased, and for the sum of one dollar to them in hand paid," &c., "have remised, released, and for ever quit-claimed, and by these presents do remise, release, and for ever quit-claim unto Joseph Fearon," &c., "to have and to hold the said tracts of land, lots and premises above described, unto the said Joseph," &c., "their heirs and assigns for ever," with covenant of special warranty. This deed included the land in question, and was recorded in Centre county, 26th May 1825. Robert Fearon had previously died.

No special allotment was made by this deed to the children of Abel Fearon, in severalty, nor do they appear to have ever conveyed to the children of William, or to have done any act accepting the partition made by the deed of March 1825, either separately or jointly, as the representatives of their branch of the family, until Fox and wife removed from England to Philadelphia, in 1827. On the 13th of November 1827, a paper was executed, purporting to be an indenture of partition made between Joseph Fearon, Jacob Fox and wife, and Christopher *Scarrow and wife, [*20 reciting the deed of March 1825, and dividing among themselves, in severalty, the lands and lots conveyed to them by that deed; the tract in question was allotted to Fox and wife. This paper was signed by Joseph Fearon, Jacob Fox and Elizabeth his wife, who acknowledged it, the same day, in due form, before a justice of the peace of the county of Philadelphia. It also purported to be executed by Scarrow and wife, by their attorney, Nathaniel Nunnelly, but was not acknowledged by him, till the 4th of October 1828; it was recorded in Lycoming county, 25th October 1828. That this deed was not, in fact, executed by Nunnelly, in 1827, appears by his acknowledgment; which states it to have been done in virtue of a power of attorney, executed by Scarrow and wife on the 5th June 1828. That power appears to have been executed on the 25th June 1828, constituting Nunnelly and Jacob Fox, the attorneys of Scarrow and wife, with power to Nunnelly alone, giving full authority over all their property held as one of the heirs of Joseph Fearon, the uncle. It took no notice of the deed of partition from the heirs of William Fearon to the heirs of Abel, but throughout was

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predicated on the fact of the estate of Joseph Fearon remaining undivided in the hands of the children of his two brothers, as tenants in common. No construction can be given to it, by which to make it operate as an acceptance of the partition made by the deed of 1825, or any release of the right of Mrs. Scarrow to claim her undivided share of the whole estate of her uncle. There was, besides, a fatal objection to the power of attorney, as there was no separate examination of Mrs. Scarrow, nor any acknowledgment by her ; the proof of its execution was by the oath of a subscribing witness only. It was afterwards duly acknowledged, on her separate examination, on the 8th of September 1832.

On the same day, Scarrow and wife, by their deed, reciting the deeds of partition of 1825, made by the heirs of William Fearon, and of 13th November 1827, by Joseph Fearon, and Fox and wife, Nunnelly, their attorney, in October 1828, confirmed them all, according to their several allotments. This deed was regularly acknowledged in England, on a separate examination, *21] and recorded the 10th June 1833. *On the 16th April 1830, Fox and wife conveyed the tract in question to Valentine, under whom the plaintiff claimed ; which conveyance was ratified and confirmed by the deed of confirmation by Scarrow and wife, on the 8th September 1832.

In March 1827, James Fearon, the administrator of Joseph Fearon, the uncle, was informed of the sale of several of the tracts of land belonging to the estate, for taxes, of which the tract in question was one. In February 1828, the treasurer of Lycoming county came to Philadelphia, where he met Jacob Fox, Nunnelly and Joseph Fearon ; he have them a statement of the tracts which had been sold, and advised them to redeem them, or they might be lost. Fox, at first, appeared disposed to redeem, but Nunnelly opposed it ; Fox finally said, he would run the risk, as they intended to start in a few days to see the lands ; but he paid no attention to them, nor made any offer or attempt to redeem, till October 1828, after the time of redemption had expired. Some negotiation took place between Fox and the defendant afterwards, concerning the land in question, which proved abortive. Fox continued to assert this claim to the land, till he sold it to Valentine in 1830. Quay made the offer to redeem, without any authority from Fox, but from a sense of duty to the heirs ; who, he said, would reimburse him, if it fell into their hands, and on the expectation that he would, at some time, own it.

It thus appears, that before the execution of the deed of partition, on the 26th March 1825, Robert Quay was, in right of his wife, entitled to an undivided share of the land in question, and continued so entitled, until his interest was divested by the legal effect of that deed. The question is, when it took effect as a severance of the joint interest which all the heirs of Joseph Fearon had in his estate ; it could not be, by the mere delivery of the deed, by the heirs of William Fearon, to any other than the heirs of Abel Fearon, and on an acceptance by them individually. A partition is inchoate, till made by all parties, or till made by one and accepted by the others : there must be a deed of partition, a partition *in pais*, or such acceptance of a deed of partition, as would amount to an estopped, before the estate can be held in severalty. In this case, the heirs of Abel Fearon do not appear to have *22] been conusant of the deed of 1825, at the time *it was made ; and neither of them had done any act which could amount to an accept-

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ance of the allotment therein made, until its ratification by Fox and Joseph Fearon, by their deed of 13th November 1827, dividing among the heirs of Abel Fearon, the several tracts and lots of land conveyed to them undivided. But this left the partition open, till Scarrow and wife would become parties to it ; which was not till the signature of Nunnelly, their attorney, in October 1828, in virtue of the power of attorney executed in June 1828. As, however, this power was not acknowledged by Mrs. Scarrow, so as to give any authority to affect her real estate, her interest remained undivided, till the deed of confirmation of 8th September 1832, which ratified the partition of 1825, by the solemn act of partition in 1827, among the heirs of Abel, according to the previous allotment, both of which were specially recited and confirmed. This being, in law, equivalent to a deed from them to the heirs of William Fearon, of the residue of the estate of Joseph Fearon, consummated the partition, by the act of all the parties in interest. The deed of 1825 then took effect, as a divestiture of the interest of Quay and wife in the land in question, by relation to its date ; but while the partition was *in fieri*, the estate remained undivided. This was in accordance with the terms of the deed of 1825 ; the consideration of which was a conveyance, to be executed by the heirs of Abel Fearon, of a quantity of land, to be estimated equal to what was thus conveyed by the heirs of William. The intention of the parties thus corresponding with the legal effect of their deeds, it is perfectly clear, that, till the consummation of the partition in 1832, Quay and wife held an undivided interest in the land in question, as owners thereof, in common with the other heirs of Joseph Fearon ; and the only remaining question is, whether he had a right to redeem from a sale for taxes, in May 1828 ?

A law authorizing the redemption of lands so sold, ought to receive a liberal and benign construction, in favor of those whose estates will be otherwise divested, especially, where the time allowed is short, an ample indemnity given to the purchaser, and a penalty is imposed on the owner. The purchaser suffers no loss ; he buys with full knowledge that his title cannot be absolute for two years ; if it is defeated by redemption, it reverts to the lawful proprietors. It would, therefore, seem not to be necessary, for the purposes of justice, or to effectuate the objects of the law, that the right to redeem should be narrowed down by a strict construction. In this case, we are abundantly satisfied, that it comports with the words and spirit of the law, to consider any person who has any interest in lands sold for taxes, as the owner thereof, for the purposes of redemption. Any right, which, in law or equity, amounts to an ownership in the land ; any right of entry upon it, to its possession or enjoyment, or any part of it, which can be deemed an estate in it, makes the person the owner, so far as it is necessary to give him the right to redeem. The decision of this case does not make it necessary to go further than to determine, that Quay, as a part-owner, had a right to redeem ; that he caused an offer to redeem to be made to the treasurer, within two years, as well as to the defendant, both of whom refused to accept the redemption money. This brings the case within the provisions of the law ; it does not require a payment or tender ; an offer and refusal is made equivalent to a receipt of the money by the treasurer, and authorizes a recovery of the land by suit, as if no sale had been made. In instructing the jury that Quay had no right to redeem,

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there was, therefore, error in the court below; the judgment must consequently be reversed, and a *venire de novo* awarded.

THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the western district of Pennsylvania, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court, with directions to that court to award a *venire facias de novo*.¹

*24]

*OWINGS *et al.* v. The Lessee of TIERNAN.

Practice.

The rule of court for docketing and dismissing causes, made at January term 1885, has never been applied to any cases, where, before the motion was made, the cause has been actually placed on the docket. Under such circumstances, on a motion to docket, where a motion to dismiss was contemporaneously made, the cause was allowed to be docketed; the usual bond for the clerk's fees being given. Time was given to the plaintiff in error to give the bond.

ERROR to the Circuit Court of Kentucky.

A motion was made by *Underwood*, for the defendant in error, to docket and dismiss the suit, according to the amended rule of the court, made at the last term, for want of its being duly entered on the docket; the writ of error having been sued out, before the last January term, and the suit not having been docketed at that term, nor at the present term. A motion was contemporaneously made by *Crittenden*, for the plaintiff in error, to docket the suit now, the record having been returned to the clerk's office in October last, and the docketing of it having been delayed on account of the usual bond for the clerk's fees not having been given by the plaintiff in error.

STORY, Justice, delivered the opinion of the court, to the following effect:—The rule of the court for docketing and dismissing causes, has never been applied to any cases, where, before the motion was made, the cause had been actually placed on the docket. In the present case, the motion to dismiss, and the motion to docket the cause, are contemporaneous. The court are of opinion, that, under such circumstances, the motion to docket the cause ought to be allowed, upon the usual bond for the clerk's fees being given. For this purpose, time will be given to the plaintiff in error (as it is asked), until the 1st day of March next. If, by that time, no bond is given, the cause will then be dismissed, according to the motion of the defendant in error.

¹ For a further opinion on this case, see 12 Pet. 345.

*SAMUEL D. HARRIS and others v. JESSE D. ELLIOTT.

Appurtenances.

Certain streets were laid out by the town of Charlestown, Massachusetts, and the proceedings relative to the same were afterwards confirmed by an act of the legislature; the streets passed over the land of John Harris, and he afterwards received a compensation from the town for taking the land occupied by the streets; in 1800, the United States, under the authority of an act of the legislature of Massachusetts, purchased of Mr. Harris several parcels of land, subsequently occupied as a navy yard; and in 1801, by an arrangement between the town of Charlestown and the United States, the streets, so far as they were within the limits of the navy yard, were closed up, and had ever since been discontinued; and had been used as a part of the navy yard. The agent of the United States and Mr. Harris, not agreeing as to the value of the land taken for the navy yard, the value was ascertained and determined by a jury proceeding under a law authorizing the same, and the amount of the valuation paid to Mr. Harris by the United States; the jury did not appraise the land on which the streets were laid out; one lot of ground was appraised "with the appurtenances." This action was instituted by the heirs of Mr. Harris, claiming to be paid the value of the land on which the streets had been laid out but which had been discontinued; the defendant was the commandant of the navy yard.

The term *appurtenance*, in common parlance, and in legal acceptation, is used to signify something appertaining to another thing as principal, and which passes as incident to the principal thing; land cannot be appurtenant to land; the soil and freehold of the streets did not pass to the United States, under and by virtue of the term "appurtenances."¹

The right of the plaintiffs to the freehold of the streets is not barred by the first section of the act of the legislature of Massachusetts of 30th October 1781.

The law, in Massachusetts, is well settled, that where a mere easement is taken for a public highway, the soil and freehold remain in the owner of the land, incumbered only with the easement; and that upon the discontinuance of the highway, the soil and freehold revert to the owner of the land.

It has been repeatedly ruled in this court, that the whole case cannot be brought here, under the act of 1802, upon such a general question; the act provides only for bringing up in this manner specific questions, upon which the judges in the circuit court may be opposed in opinion.

CERTIFICATE of Divison from the Circuit Court of Massachusetts. This was an action of trespass *quare clausum fregit*, instituted in the circuit court of the United States, at October term 1833, against the defendant, Jesse D. Elliott, the commandant of the United States navy yard at Charlestown, Massachusetts, in *order to determine the title claimed by the plaintiffs, as heirs of John Harris, formerly of Charlestown, [*26 Massachusetts. The United States, the real possessors, and asserting an ownership of the property, took defence in the suit; being desirous of having the rights asserted by the plaintiffs ascertained and determined. The cause was submitted to the court on a statement of facts agreed upon by the counsel for the plaintiffs, and the district-attorney of the United States. They were as follows:

"In the year 1780, a committee, appointed by the town of Charlestown, in the county of Middlesex, in the state of Massachusetts, projected certain streets in said town, and laid them down on a map or plan, which was

¹ Where land is granted, by defined boundaries, other land cannot pass as appurtenant to the grant. *Woodhull v. Rosenthal*, 61 N. Y. 382; *Armstrong v. Du Bois*, 90 Id. 95; *New York Central Railroad Co. v. Buffalo and New York and Erie Railroad Co.*, 49 Barb. 501; *Lawrence v. Delano*, 3 Sandf. 833. It is other-

wise, however, if such appears to have been the intention of the parties, to be collected from the deed itself, the situation of the parties, the apparent motives which led to the contract, and the contemporaneous construction put upon it. *Lazaretto Road*, 1 Ash. 417; *Hill v. West*, 4 Yeates 142, 153.

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deposited and now remains in the office of the secretary of state of the commonwealth of Massachusetts ; and on the 30th day of October 1781, the legislature of said commonwealth passed an act, confirming the doings of said committee, and barring actions in certain cases therein specified. The street now called Water street (being the most southerly street on said plan) was not in fact entirely laid out by said town, until the year 1795 or 1796 (a street commonly called Battery street, which ran in the same direction, being used as a highway until that time), and that the most northerly street on said plan, called Henley or Meeting-house street, was not in fact laid out by said town, until the year 1798 or 1799.

" That John Harris late of said Charlestown, merchant, deceased, purchased several parcels of land in said Charlestown, viz., one parcel, of Andrew Newell, by deed duly executed on the 11th day of January 1791, described as follows : a tract of land containing five acres, more or less, bounded south-westerly on land of Joseph Barrell ; north-westerly on a road leading to the brick-kilns ; north-easterly on a highway leading from the Battery to Moulton's point ; south-easterly on Charles river down to low-water mark ; saving and reserving a highway through the same from the Battery to Moulton's point. Another parcel of land, of Joseph Barrell, by deed duly executed on the 16th of June 1792, viz : a certain piece of land, bounded and measuring as follows, viz., front on Battery street, S. S. E. *there measuring 177 feet ; upon land of Andrew Newell, *27] E. N. E. 458 feet ; upon Back lane, N. N. W. 184 feet ; upon land of the heirs of Joseph Leman, Esq., W. S. W. 450 feet ; then turning upon said Leman's land, W. S. W. 57 feet, till you come into Battery street. Also, a part of a wharf and land upon Battery street, opposite to where the cellar stands, on said lane, measuring upon Battery street, N. N. W. 114 feet ; on Charles river, S. S. E. and continues the same breadth to low-water mark, or however otherwise bounded, or be the same measure more or less, together with all the rights, privileges and appurtenances to said granted land and premises. Another parcel of land, of John Larkin, by deed duly executed 6th July 1793, viz : a certain parcel of land containing about one acre and one-half, bounded on land of John Harris, W. S. W. ; on said Harris, southerly ; on land of Captain Thomas Edes, southerly ; on land of Captain Thomas Harris and Amos Sampson, W. S. W. ; on Back lane, N. N. W. ; on John Harris, formerly Joseph Barrell, Esq., E. N. E. to Battery street. Another parcel of land, of David Munroe, by deed duly executed on the 3d day of April 1793, viz : a piece of land containing by estimation about one-eighth of an acre, butted and bounded as follows, viz., easterly and northerly by land formerly of Edward Wilson, but lately — Lemmon ; westerly by land formerly of Colonel John Phillips, and lately owned by Benjamin Wheeler, deceased ; and southerly by the street or highway called Wapping street, or however otherwise bounded or reputed to be bounded. The above-described parcels of land comprise the two parcels of land described in the writs ; and are parts of the land covered by said streets as laid down on said plan and afterwards laid out.

" The said town of Charlestown, in the years 1795 and 1796, laid out the easterly part of the southerly highway on said plan (now called Water street), over a part of the former Battery street, and a part of the land of said John Harris, conveyed to him as above described, and the said John

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Harris, by the award of referees, dated July 25th, 1796, received from said town a part of the land forming the old (Battery) street and the sum of *\$450 in damages, for taking his land over which said highway [*28 passed. The following is a copy of said award :

"The subscribers, referees chosen to determine a difference between the town of Charlestown, on one part, and John Harris, of said Charlestown, merchant, on the other part, pursuant to a law for amending the streets of said town, laid waste by fire, by the British troops, have met and fully heard the parties, and viewed the premises, and considered the disadvantage to the said John Harris's lots on the street leading from the swing bridge to the place of the old battery, in said Charlestown (so far as the same has not been heretofore settled), by taking a part of said lots into the street, and also the advantage derived to said lots, discontinuing the old street, where it does not make a part of the present street, and also the advantage of the new street being more wide, commodious and direct, than the old street was—do award that the said town of Charlestown do pay to the said John Harris the sum of \$450, and relinquish all claims to that part of the old street which comes within said lots, as they are left by the said new street. The lots considered extend, on the north-west side of the street, from the north-east corner of Thomas Edmands, formerly Henley's, to a place marked on the plan by the word "stump," being on the plan a corner of a street proposed to lead to the meeting-house, but not yet opened. The town of Charlestown are to pay the costs of the referees, and the tavern-bill of the house where they sit. Done at Charlestown, the 25th day of July, A. D. 1796. JAMES WINTHROP, MATTHEW CLARK, AMOS BOND, Referees.

"That in the year 1798 or 1799, the said town of Charlestown laid out the most northerly street or highway, marked on said plan, called Meeting-house or Henley street, through and over the land of said John Harris, conveyed to him as above recited, and on the —, said John Harris received from the said town of Charlestown the sum of — in damages, for taking the land belonging to him, over which said street last mentioned passed.

"That in the year 1800, the government of the United States, [**29 under the authority of the statute of Massachusetts, passed June 17th, 1800, purchased of said John Harris, several parcels of land in said town of Charlestown, which are now included within the limits of the navy yard in said town. The value of the land so taken was ascertained by the verdict of a jury (agreeable to the provisions of said statute). On the 29th November 1800, and 6th February 1801, said Harris received from the United States the sums so ascertained, as the value of the said lands. The proceedings in ascertaining the value of said lands were as follows :

"Commonwealth of Massachusetts. To the honorable the justices of the court of general sessions of the peace, begun and held at Concord, in and for the county of Middlesex, on Monday next preceding the second Tuesday of September, A. D. 1800. The petition of Aaron Putnam, agent of the United States of America, respectfully sheweth, that your petitioner having been directed by the government of the United States to purchase a certain tract of land in Charlestown, for a navy and dock yard for the United States, and not being able to agree with Mr. John Harris, of said

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Charlestown, for sundry lots of land belonging to him, which lots are within the limits pointed out by the government, your petitioner, therefore, prays that the honorable court would order the sheriff of said county to summon a jury to appraise and value said lots or tracts of land, that the United States may possess the same at a fair and equitable value, agreeably to a law of the said commonwealth in that case made and provided.

"September 11, 1800.

AARON PUTNAM,

Agent for the United States.

"October 22, 1830. A Copy. Attest—A. BIGELOW, Clerk.

"Middlesex, ss : 4th October 1800. We, the jury, impanelled and sworn, as before certified, having been shown several lots of land, which belong to John Harris, of Charlestown, in the county of Middlesex, merchant, *lying within the limits mentioned in the act in this case made *30] and provided, and fully heard the said Harris, as well as Aaron Putnam, Esquire, agent for the United States, together with the testimony by them respectively produced, touching the value of the said lots, we have set out the said lots by metes and bounds, and do appraise and value the same as follows, viz., one lot, containing five acres, two quarters and thirty-five rods, bounded as follows : beginning at the northerly corner of Amos Samson's land, by the lane which leads to the brick-yards, thence running southerly, as the fence now stands, partly by land of the said Samson, and partly by land of Thomas Harris, to the street lately laid out from the meeting-house to Charles river, thence running easterly on the same street, until it comes to a cedar post marked, with stones about it ; thence running in the same direction to a stake and stones ; thence running northerly, on a straight line, to a post in the fence, with the top hewn on all sides ; thence running still northerly, as the fence now stands, to the lane first mentioned ; thence running westerly, by the same lane, to the place first mentioned, which same tract of land, on our oaths, we do appraise and value at \$13,000 and no more. Also, one other lot of land, with the appurtenances, containing one-half of an acre, bounded as follows, viz., beginning at a stake and stones, by the street lately laid out from the meeting-house to Charles river, thence running southerly by land of Thomas Edes, until it comes to a post in the south-easterly corner of said Edes's fence, by Battery street, thence running northerly, by the same street, till it comes to a stake and stones standing where the same street meets the street lately laid out as aforesaid ; thence running south-westerly, by the same street, to the stake and stones first mentioned ; which same tract and lot of land we do, on our oaths, appraise and value at \$1300 and no more. Also, one other lot of land, containing one acre and two quarters, more or less, bounded as follows, viz., beginning at a stake and stones, where Wapping street and Battery street intersect each other ; thence running north-easterly, by Battery street, to a stake and stones, by land claimed by the said Edes, *and *31] in dispute between him and the said Harris ; thence running south-easterly, by the same land, to low-water mark ; thence running south-westerly, by low-water mark, till it comes to Wapping street aforesaid ; thence westerly, by the same street, to the stake and stones first mentioned ; which same tract of land we do, on our oaths, appraise and value at \$1500 and no more. Also, one other tract and lot of land containing three-quarters of an acre,

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more or less, bounded as follows, viz., beginning at a stake and stones, by Battery street, by the north-westerly corner of the lot of land last described; thence, running south-easterly, by the same lot of land, to low-water mark; thence running north-easterly, ninety-seven feet, by low-water mark; thence running north-westerly, on a straight line, to stake and stones by Battery street aforesaid; thence south-westerly by the same street to the stake and stones first mentioned; which same tract of land we do, on our oaths aforesaid, appraise and value at \$500, and no more. Also, one other lot of land, containing one acre and one-quarter, more or less, bounded as follows, viz., beginning at a stake and stones at the north-westerly corner of the lot of land last described, thence running north-easterly by said Battery street to land of John Larkin; thence running south-easterly, by land of said Larkin, to low-water mark; thence south-westerly, by low-water mark, to the piece and lot of land last described; thence north-westerly, by the same lot of land, to the stake and stones first mentioned, which same lot of land we do appraise and value, on our oaths aforesaid, at the sum of \$787, and no more. In witness whereof, &c.

"The foregoing is a true copy of the verdict of the jury summoned by the sheriff of the county of Middlesex, by virtue of a warrant to him directed, which issued from the court of sessions for the county of Middlesex, on the application of Aaron Putnam, agent for the United States, to appraise the value of certain lands taken for a navy and dock yard in Charlestown, for the United States, which lands belonged to John Harris, of said *Charlestown. Which verdict is annexed to said warrant, and [*[#32] on file with the files of said court of sessions for September term, 1800.

"Attest.—A. BIGELOW, Clerk.

"Clerk's office, Cambridge, October 27, 1830.

"The street called Battery street in the foregoing description is now called Water street.

"It appears from the foregoing description, that such part of the street as was given up to said Harris, by the town, by the award of the referees, on the 25th July 1796, was included in the transfer to the United States, and paid for by them.

"That on the 14th day of January 1801, a committee of the town of Charlestown, appointed to consider the subject of granting or exchanging the roads and streets for the accommodation of the navy and dock yard, having conferred with the agent of the United States, and examined the land particularly located for that purpose, made a report, which was adopted by the town, and is as follows: 'That in consideration of the benefit expected from so important an establishment, such parts of the following streets and passage ways belonging to the town as are included in the limits of the navy and dock yard, be granted for the sole use of the United States, and that their termination from the Main street be as follows: the street laid through the land lately belonging to Mr. John Harris, by a line across the same, from the easterly bounds of the land of Capt. Thomas Edes; the Wapping and Battery streets, by a line across the same, on the easterly bounds of a passage way twenty-one feet wide, belonging to the town, which leads to low-water mark; the road leading to Moulton's point, by a line across the same, from the northerly bounds of the land lately

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belonging to Aaron Putnam, Esq.: provided, however, that if the navy and dock yard should be discontinued, or the land converted by the United States to private uses, these grants shall be void, and the aforesaid streets and passage ways shall be opened as before, for the use and accommodation of the town.' John Harris requested an entry of his protest to the report, on account of his right to the advantages of the said streets. That from *33] and after the passing of the foregoing vote the two *streets marked on the said plan, so far as the same are contained within the limits of the said navy yard, were, and have been discontinued, and have ceased to be used as public highways, and have been used as a part of the navy yard.

"That at the time the United States took the land of John Harris, there were three wooden buildings on lot No. 2, and no buildings on the other lots. That said John Harris, at that time, owned a small gore of land adjoining the west end of lot No. 2, which was sold by his administrators to Commodore Hull, in 1817, and afterwards sold by said Hull to the United States; the same gore of land is now inclosed within the walls of the navy yard. That the town of Charlestown, on the 2d March 1801, sold to Aaron Putnam a part of the road leading to the brick-yards, which, said Putnam, afterwards, on the 2d of April 1801, sold to the United States, and it is now within the limits of the navy yard.

"That said John Harris died on the 19th of October 1804 (having devised all his real estate to his brothers, Thomas Harris and Jonathan Harris, who, together with a niece, to whom said John gave an annuity, were the heirs-at-law of said John), never having made an entry on the land covered by said streets, nor did the said Thomas or Jonathan ever enter therein. That said Thomas Harris died on —— of June 1814, intestate, and his estate descended to his children, Thomas Harris, John Harris and Mary Coleman. That said Jonathan Harris died on the 14th day of August 1814, intestate, and his estate descended to his children, Samuel D. Harris, Richard D. Harris, Charles Harris, Henry Harris, Mary Harris, Charlotte Harris and Augusta Harris; and that the said Charlotte and Augusta were infants within the age of twenty-one years, at the time of the decease of the said Jonathan, and the other children of said Jonathan were of full age, at the time of his decease. That the heirs of said Jonathan and Thomas Harris claim to hold said two parcels of land, described in the writ, as tenants in common; and that the said Richard for himself, and the other heirs of said Jonathan, and the heirs of said Thomas above mentioned, made an entry into said two *parcels of land, on the 4th Sep- *34] tember 1830, claiming title to the soil and freehold thereof, but have been constantly repulsed and kept out of possession by the officers of the United States, in command of the navy yard, and particularly at the time of the trespass complained of in this action, by the present defendant, the commandant of the navy yard. A similar entry was made on the 11th September 1833, which was repulsed in the same manner.

"An act for widening and amending the streets, lanes and squares, in that part of the town of Charlestown which was lately laid waste by fire. Passed 30th October 1781.

"Whereas, great desolation and destruction was, some time since, made by the British troops in Charlestown, wantonly destroying the same by

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fire. And whereas, a committee was appointed by the town aforesaid, for regulating the streets, lanes, and squares in that part of the town which was so laid waste, and the committee hath accordingly proceeded to lay out the same; a plan whereof hath been laid before this court, and is now deposited in the secretary's office.

"§ 1. Be it, therefore, enacted, that the said proceedings of the committee be and are hereby confirmed; and all actions that shall be brought for recovering possession of any land lying within any of the streets, lanes, squares, &c., laid out as aforesaid, or for damages sustained or occasioned thereby, shall be utterly and for ever barred.

"§ 2. That no building whatsoever be so erected as to encroach upon any street, lane or square, by them laid out as aforesaid; and that every building so erected be deemed a nuisance, and be accordingly taken down or removed, by the order of any two justices for the county of Middlesex, or the selectmen of Charlestown, the charge of such removal to be paid out of the moneys which shall be raised by the sale of the materials of such building, which, by the order of said justices or selectmen, shall be sold for that purpose, unless the said charges shall be immediately paid by the owner.

"§ 3. That if any person or persons whatsoever shall, wittingly or willingly, without good authority, pluck up or remove any of the stakes or bound-marks which have been or shall be fixed or set up by said committee, to distinguish and ascertain the streets aforesaid, and shall be thereof convicted before any justice of the peace for the county of Middlesex, each and every person so offending shall forfeit and pay the sum of forty shillings for the use of said town, or, on failure thereof, shall suffer imprisonment for the space of two months: And whereas, some persons may suffer damage by laying out the streets, &c., according to the plan aforesaid, and others may receive benefit and advantage thereby—

"§ 4. Be it further enacted, that the value of all lands and buildings and other materials taken from any person, by virtue of this act, shall be determined by three persons mutually chosen for that purpose, one of which shall be appointed by the selectmen, or a committee chosen for that purpose, which person, so appointed by the selectmen or committee, shall not be an inhabitant of the town; and the other, by the party interested in the land; which two shall choose a third, and the judgment of the three persons, or any two of them, so chosen, shall be final in the case, and the town held and obliged to pay to the person interested in the land, buildings or materials aforesaid, the sum at which it may be appraised as aforesaid.

"§ 5. That in any case where the whole of any person's land may not be taken away by the plan aforesaid, the appraisers afore-mentioned, in estimating the sum said person shall receive, shall consider the advantage his remaining land receives, as well as the value of land taken from him by the plan aforesaid, and from a consideration of all circumstances, determine the sum of money such person shall receive as aforesaid. And whereas, some estates may be advantaged and rendered more valuable by the execution of the plan aforesaid—

"§ 6. Be it, therefore, enacted, that the selectmen, or a committee appointed by the town for that purpose, shall have power to call upon all persons whose estates (in their opinion) are benefited by the execution of the plan aforesaid, to join in the appointment of appraisers [§ 36

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in the manner before provided in this act, for estimating damages as aforesaid; which appraisers shall have full power and authority to determine the sum that the owner of any estate so benefited ought to pay; which estate shall be subjected to make good the sum so awarded by the appraisers aforesaid. And whereas, the house lots of Richard Devans, Esq., and Messieurs Ebenezer Breed and Jonathan Penny are taken away by the plan aforesaid—

“§ 7. Be it further enacted, that the selectmen of the town aforesaid, or a committee appointed by the town for that purpose, shall be held and obliged to procure good and sufficient house lots for said Richard Devans, Ebenezer Breed and Jonathan Penny, which, in the opinion of appraisers to be chosen as is before provided by this act, shall be equal in value and convenience to those taken away as aforesaid. And when said house lots are procured for the persons aforesaid, then their lots and buildings shall be under the same rules and regulations as to moving the buildings thereon, as is before provided by this act for removing and preventing incumbrances and nuisances. And whereas, some persons, in order to defeat the good purposes designed by this act, may refuse or neglect to join in the appointment of appraisers, as is before herein provided—

“§ 8. Be it further enacted, that if any person or persons shall, after being duly notified thereof, by the selectmen of the town, or a committee appointed for that purpose, refuse or neglect to join in the appointment of appraisers as aforesaid, then it shall and may be lawful for the selectmen, or committee aforesaid, to apply to any two justices of the peace in the town of Boston; which two justices shall, upon such application, notify the party so refusing or neglecting, and after such notice duly given, the said two justices shall have full power and authority to appoint any three freeholders of the town of Boston, who shall have the same power and authority in valuing any piece of land; and all persons shall be as fully bound thereby,

*37] as though the parties had joined in the appointment. *And whereas, the inhabitants of the town of Charlestown are, by reason of their losses in this present war, so reduced in their circumstances, as to be rendered unable, without the assistance and encouragement of the public, to carry said plan into execution—

“§ 9. Be it further enacted, that from and after the passing of this act, there shall be allowed and paid out of the public treasury of this commonwealth, to the honorable Nathaniel Gorham, Esq., Thomas Russell, Esq., and Mr. David Wood, jun., or the survivor of them, one-half of all the taxes paid by the town of Charlestown, for the space of seven years, to be applied to the purposes before mentioned.

“§ 10. That the treasurer of this commonwealth be and hereby is directed, to pay into the hands of the said Nathaniel Gorham, Thomas Russell and David Wood, jun., or the survivor of them, one-half of all the taxes laid upon said town, for the purposes aforesaid.

“An act authorizing the United States to purchase a certain tract of land in Charlestown, for a navy yard. Passed 17th June 1800.

“§ 1. Be it enacted, that the consent of this commonwealth be and hereby is granted to the United States, to purchase a tract of land situated in the north-easterly part of the town of Charlestown, in the county of

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Middlesex, adjoining and bounded on two sides by Charles and Mystic rivers, not exceeding sixty-five acres, exclusive of flats, for the purpose of a navy or dock yard, or both of them, and erecting magazines, arsenals and other needful buildings. The evidence of the purchases aforesaid, to be entered and recorded in the registry of deeds in the said county of Middlesex. Provided always, and the consent aforesaid is granted upon the express condition, that this commonwealth shall retain a concurrent jurisdiction with the United States, in and over the tract of land aforesaid, so far as that all civil, and such criminal, processes as may issue, under the authority of this commonwealth, against any person or persons *charged with crimes [*38 committed without the said tract of land, may be executed therein, in the same way and manner as though this consent had not been granted.

"§ 2. That if the agent or agents employed for the United States, and the owner or owners of said tract of land so to be purchased, cannot agree in the sale and purchase thereof, such agent or agents may apply to any court of general sessions of the peace which shall be holden within and for the aforesaid county of Middlesex ; which court, after due notice given to the said owner or owners, are hereby empowered and directed to hear, and finally determine the value of the same tract of land, or any part or portion thereof, by a jury, under oath, to be summoned by a sheriff or his deputy for that purpose, or by a committee of three persons, if the parties aforesaid can agree upon them ; and the value thereof being thus ascertained by the verdict of such jury, or the report of such committee, who are also to be under oath faithfully and impartially to value said tract of land, or any portion of the same ; and such verdict or report being accepted and recorded by said court, and the amount thereof being paid or tendered to the owner or owners of any part of said tract of land, that shall have been thus valued, with his or her reasonable costs ; the said tract of land, or such parts of the same as shall be thus valued, shall for ever be vested in the United States, and shall and may be by them taken, possessed and appropriated to the purposes aforesaid."

Upon the trial, and statement of facts in this cause, the following questions occurred, on which the opinions of the judges were opposed, and thereupon, it was ordered by the court, on motion of William Minot, of counsel for the plaintiffs, that the points on which the disagreement happened should be certified to the supreme court for their decision.

1. Whether the soil and freehold of the street called Henley or Meeting-house street, and of the street called Battery or Water street, did or did not pass to the United States, under and by virtue of the term appurtenances, used by the jury in their verdict, in the description of the lot No. 2, or by the description *in said verdict of lots No. 1 and 3, or by the proceedings by which the land was taken by the United States? [*39]

2. Whether the limitations contained in said statute of October 30th, 1781, is a bar to the plaintiff's right to recover the soil and freehold of said streets?

3. Whether, upon the discontinuance of a highway in Massachusetts by the public, the soil and freehold of such highway reverts to the owner of the land taken for such highway?

4. And upon the facts stated, whether the plaintiffs have any right or

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title to the lands taken for streets, in which the trespass is supposed to have been committed, and can maintain their said action?

The case was presented to the court on a printed argument, prepared by *Minot*, of Massachusetts: and was also argued at the bar by *Reed*, for the plaintiffs; and for the defendant, by *Butler*, Attorney-General of the United States.

I. Upon the first point reserved, "whether the soil and freehold of the street called Henley or Meeting-house street, and of the street called Battery or Water street, did or did not pass to the United States, under and by virtue of the term 'appurtenances,' used by the jury in their verdict, in the description in the same, of lots No. 1 and No. 3, or by the proceedings by which the land was taken by the United States;" it was contended, that the 2d section of the act of June 17th, 1800, authorizing the purchase of the navy yard, provided, that if the United States, by their agent, and the owner of the land, cannot agree, the land taken by the United States, shall be valued by a jury. John Harris did not agree that the land should be taken, and the transfer was made *in invitum*, and therefore, Harris cannot be considered as having made a voluntary conveyance. Before Meeting house street and Water street were laid out, all the land was owned by him, from the lane leading to the brick yard to low-water mark. These streets were laid out before 1800, and the jury valued the lots which were separated by the streets in distinct parcels.

The verdict finds that the jury were shown several lots of land, and that they had set out these lots by metes and bounds. *If the United States meant to take the whole land of Harris, including what was covered by streets, it is not easy to conjecture, why the jury should have valued it in separate lots; no advantage could result to either party from this valuation. The statute does not require that the land should be set out by metes and bounds; and all that could have been necessary was to describe the land, with reasonable certainty, so that it should appear that it was within the limits allowed for the purchase. But, in fact, the jury did not take the whole of Mr. Harris' land; they left a small gore adjoining the lot No. 2, which his administrators sold to Commodore Hull, and which he sold to the United States; and this gore is now within the precincts of the navy yard. It is inferred, that the jury did not intend to include, and did not, in fact, include, the soil and freehold of the streets, as parts of the land taken and valued by them, from the following facts and reasons:

1. The jury describe the several lots, as they were inclosed by fences running completely round them; and where they were bounded by streets, describing them as running on or by the streets, and thereby excluded the streets. In fact, a map of the lots could not afford a more perfect or definite description than the jury give. The only doubt which has been suggested, whether the streets are excluded, arises from the use of the word *appurtenances*, in the description of the second lot. It was argued in the court below, that if the term appurtenances carried the two streets, on which the second lot was bounded, it would give all the streets of which said Harris owned the soil; but this is an error in fact. Water or Battery street extends from the east end of lot No. 2, to a point marked B, on the south-east corner of lot No. 1, a distance of more than 300 feet; and for

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that distance, it cannot be pretended, that the soil of the street can be affected by any construction of the term "appurtenances," as used in the description of No. 2.

2. It appears, from the statement of facts, that there were buildings on lot No. 2, and no buildings on the other lot. This caused the jury to use the term appurtenances in reference to *this lot, as, in common parlance, this term is often used to mean buildings. There is no technical [*41 nicety in any of the proceedings, and the agent of the United States did not employ counsel, nor was he a lawyer.

3. If the jury intended, by "appurtenances," to include streets, why not use it as to other lots, some of which are entirely surrounded by streets, and particularly lot No. 1. These streets are of equal importance to the navy yard.

4. There is no award of the value of the streets, and as the owner of the ground did not voluntarily submit to the proceeding, all that was taken should have been valued.

5. On the north side of lot No. 1, there is a road leading to the brick-yard ; this is one of the roads discontinued by the town. In 1801, the town sold the road to Aaron Putnam, in consideration of his agreeing to make a new road in another place. The ground covered by the road conveyed by the town was, by the grantee, afterwards sold to the United States, in 1801. The purchaser from the town was the agent of the United States, thus showing they did not consider the soil of the streets as taken by the jury.

6. When the United States took the land from Harris, the streets were public highways, and the soil was of little value to Harris to sell, incumbered as it was with the easement ; nor could he make any valuable use of it, until the easement was discontinued.

7. The protest of Harris, made in public town meeting, is evidence that he did not believe the soil of the streets had been set off by the jury ; and that he considered himself as possessing an interest of some value in the streets.

It was contended by the defendant, at the trial, that in the construction of devises, though lands will not pass under the term "appurtenances," taken in its strict technical sense ; yet they will pass, if it appears that a larger sense was intended to be given to it. But the authority of the maxim, that land cannot be appurtenant to land, is not impaired by late authorities. It is recognised in *Leonard v. White*, 7 Mass. 6 ; *Doane v. Broadstreet Association*, 6 Ibid. 332. *It must be a very manifest intention of the testator, to be drawn from the will itself, which will induce the [*42 court to take the word *appurtenances* in its larger sense. Several authorities on this point are collected in a note to *Smith v. Martin*, 2 Saund. 400. In *Leonard v. White*, 7 Mass. 6, it is decided, that a deed conveying a lot of land, with a mill on it, "with the privileges and appurtenances thereto belonging," did not pass the soil of a way leading from the road to the mill, though the easement might pass as appurtenant to the land conveyed. *Jackson v. Hathaway*, 15 Johns. 447. Where a person, over whose land a highway is laid, sells the land on each side of the highway, by such a description as does not include the road or any part of it, the soil of the highway does not pass to the grantee ; as it is excluded by the description of the land granted, and cannot pass as an incident, though the deed contained the usual

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sweeping clause of all right, title, interest, &c. In *Tyler v. Hammond*, 11 Pick. 193, the defendant held a lot of ground, granted with an exact description of all the boundary lines. The deed contained a sweeping clause, under which the defendant claimed the soil in the adjoining highway; but the court held, that the particular description controlled the sweeping clause in the deed, and that the highway did not pass as an incident or appurtenance.

II. Second point, "whether the limitation contained in the statute of October 30th, 1781, is a bar to the plaintiff's right to recover the soil and freehold of said streets." Upon this point, it was contended, that the legislature meant to conform, as nearly as possible, to the existing statutes relative to highways, and to provide an equitable contribution from the property not taken for the highways, in consequence of the benefits derived from them. The preamble states the destruction of the town by the events of the war; and in 1780, an effort was made to recover it, and to lay it out in regular streets, and enable the inhabitants to rebuild their houses on a uniform plan. The committee was appointed by the town of Charlestown, and, under the laws of Massachusetts, they had no right to lay *out [43] streets; that power being in the selectmen, or persons acting under their authority, subject to the ratification of the inhabitants in town meeting. The proceedings of the committee could not take away the rights of soil in any one, and the limitation of their power was the inducement to apply to the legislature for the act to confirm their proceedings. That act did no more to give the same validity to the proceedings of the committee than to make them equivalent to the proceedings under the highway statute. It was no advantage to the town, to have the fee in the lands over which streets were laid out; and it cannot be supposed, that it was intended to give the town of Charlestown more than the highway laws give to any other town in the commonwealth. By the provisions of the highway laws, when land is regularly taken for a highway, no action for possession or for damages can be maintained. Such only was the operation of the special act. The preamble to the 4th section is in the same language of the highway statutes. "Damages for laying out," &c., is not descriptive of the loss of the freehold. It is used to express the value of the easement taken by the public. The common law, which preserves the freehold of a road to the owner of the land, was early adopted in Massachusetts, and it is not easy to conjecture why the law should be altered in this particular instance; a single instance since the settlement of the colony; or why such an alteration should be desired.

But the plaintiffs insist, that the defendant's construction of the act of 1801 cannot be correct, because such an operation of the act would infringe the constitution of the state of Massachusetts, which provides (10th section of the declaration of rights), "that whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Public exigencies require that highways shall be laid out, and a reasonable compensation for the land taken for them is provided by a series of statutes. But it is only a public exigency which justifies such an appropriation of private property, and no such exigency existed in this case. The appropriation of the free hold of a road to the public was wholly unnecessary, and *totally worthless. It is true, that the statute provides a compensation u.

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this case, but from the language used, "damages for taking" being the same as used in highway statutes, it may be inferred, that the legislature intended damages for the easement only. It cannot be presumed, that the legislature intended unnecessarily to violate private property, or to depart from the usual course of legislation on similar subjects; and in the absence of any manifest intention in the statute itself, to take the freehold of the streets, as well as from the uselessness to the town of such a proceeding, it is manifest, that the legislature have adhered to the usual course of legislation on the subject of highways, and have given to the town all that was needful for it to possess, without unnecessarily violating the property of an individual.

It may be said, that John Harris has given validity to an illegal act, by accepting a compensation. The reply is, that he had a right to compensation for the easement; that what he received was accepted by him for the value of the easement; and this is apparent from his protest at the surrender of the streets to the navy yard, "on account of his right to the advantages of the streets."

But it is doubted, whether the laying out of Water or Battery street and Meeting-house street, is affected by the operation of this statute. The language of this statute is retrospective. It confirms the past proceedings of the committee. It speaks of lands taken away by the plan. The streets in question were laid out up to the present line of the navy yard, in 1781, but were not carried into the land now occupied by the navy yard, until 1796 and 1799, and the land now claimed by the heirs of John Harris was not taken from him till 1796 and 1799. The streets were not laid through the navy yard in 1781. There was no taking of Harris' land at that time, and there could be no damages before taking. The referees, in 1796, speak of a street proposed to lead to the Meeting-house, "but not yet opened." Can the statute of 1781, confirming past proceedings, bar an action for an act done in 1796? Harris had sustained no damage in 1781. Nothing was taken from him; he had the vesture and herbage and all other profits of the land till 1796.

*It will be seen, by reference to the statement of facts, that the town of Charlestown sold Back lane, one of the streets in the navy yard, not laid out by the town's committee in 1781, and upon which that act could have no operation. From this fact, it appears, that the town considered itself vested with the whole property in the streets, by the mere act of laying them out, and did not consider that property as derived from the act of 1781.

III. On the third point, "whether, upon the discontinuance of a highway by the public, in Massachusetts, the soil and freehold of such highway reverts to the owner of the land taken for such highway," it was argued, that, it is the settled law of Massachusetts, that by the location of a way over the land of any person, the public acquire an easement; but the soil and freehold remain in the owner, although incumbered with a way, and if the way be discontinued, he shall hold the land free from the incumbrance. This position is fully sustained by the decisions of the supreme court of Massachusetts, in *Commonwealth v. Peters*, 2 Mass. 127; *Fairfield v. Williams*, 4 Ibid. 427; *Perley v. Chandler*, 6 Ibid. 454; *Alden v. Murdock*,

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13 Ibid. 259; *Stackpole v. Healy*, 16 Ibid. 33; *Robbins v. Borman*, 1 Pick. 122.

The plaintiffs' counsel also referred to the opinion of Mr. Justice STORY in the case of the *United States v. Richard D. Harris*, circuit court Massachusetts, October term 1830. 1 Sum. 21.

Reed, for the plaintiffs.—By the inquest it appears: 1. That five lots or parcels of land were appraised and taken by the United States. 2. That each lot was measured and particularly bounded. 3. That the lots were bounded as abutting the streets, and by the streets (the very streets claimed in this action), and *ex vi termini* excluding the streets. It is contended, then, as a necessary inference, that the streets being the land claimed by the plaintiffs, and once the property of their ancestor, John Harris, were not appropriated by the jury, were not set off by the jury, or paid for by the *46] United States; *and of course, did not pass to the United States, but remained in the said John Harris.

But it is contended, that the soil and freehold of the streets, being the land now claimed, passed under and by virtue of the word appurtenances, used by the jury in the appraisal of one lot, No. 2. There is no award of the value of the streets. The jury were bound to value all the land taken by the United States; and the United States were bound to pay for all the land they took; but it was not valued, or paid for, or taken. The word appurtenant might have been used by accident or caution; or what is most probable, with a view of conveying three houses, as the statement of facts finds that there were three houses on lot No. 2, and no houses on the other lots. It is admitted, the houses would have passed, without the word; but the jury might have been ignorant of the law; or have chosen to make assurance doubly sure. It is clear, that there was no intention on the part of the jury to convey the streets; but at all events, the intention to convey the streets does not appear. The streets cannot pass by the word appurtenant. The lot No. 2 touches a part of the way only upon the two streets now claimed.

1. It is contended, that it is a well-settled principle of law, that land cannot be appurtenant to land. 2. If there be exceptions to this principle, it is in cases where the intention of the parties is manifest, and where the court reject the legal and technical meaning to establish and effectuate the manifest intention. If such construction is claimed, let it be clearly shown that such was the intent. The reverse is the fact. The other four lots taken were bounded by streets, and lot No. 1 was surrounded by streets, all a part now of the navy yard; why did they not use the word appurtenant?

Second point: In examining the statute of October 1780, it is very material to bear in mind the subject-matter about which *they were *47] legislating. The subject-matter was streets, lanes, squares, &c. By the law of Massachusetts, town roads are laid out by a class of magistrates called selectmen. In the present case, the streets, lanes, &c., were laid out by a committee, and not by the legal authority. The laying out, therefore, needed legislative sanction and confirmation. Charlestown did not apply to the legislature, because they wanted streets and lanes different from other

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towns, nor the fee in the streets ; but because they wanted streets, &c., laid out by a committee, and not by the authorized magistrates of the selectmen.

By the act referred to, of 1780, the easement or privilege of highways alone passed. Why did the town desire the fee ? No man had foresight to look forward to the time when it might be of use. No other town had such fee in a road ; and it appears by the very act referred to, that one-half their taxes were relinquished by the state, to enable them to pay for the roads, and surely, under such circumstances, they could not desire to buy, nor would the state consent to aid them in purchasing, what they did not need, and what other towns did not possess. Another argument, not to be overlooked, is, that it is a principle of law that special acts in derogation of private rights should be construed strictly. Harris parted with no portion of his land voluntarily ; let it then be clearly shown it was taken by force of law. His land cannot legally be taken by doubtful construction.

The most material point and argument, and which is considered unanswerable, is the objection arising from the constitution of Massachusetts. By the 10th section of the declaration of rights, it is provided, "that whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." It is contended, in the case on trial, that the fee of the land was taken. But the legislature had no authority to take it, unless the public exigencies required it. It is manifest, the public exigencies did not require it ; the easement was required, and not the fee ; *and therefore, the legislature cannot be presumed to act in violation of the [*48 constitution, and if they did so act, their acts are void and not binding. The act of 1780, then, granted the easement and not the fee ; and the first section of the act, barring all actions for recovering possession of any land lying within any of the streets, lanes, squares, &c., was intended to apply to the use—the easement ; and was intended to be in force so long as those lanes, ways and squares were used for the purposes for which they were laid out, and no longer.

Again, it is contended, that the act of 1780, above referred to, confirmed and legalized the laying out of lanes, streets, &c., agreeable to a plan laid before the court. The streets being the land now in controversy, were not in fact laid out until 1796 and 1799 ; and therefore, no plan of such streets could have been laid before the legislature, in 1780. What is a plan, or chart or map, but a picture of something real ? The streets in question were not laid out, previous to the law, and were not confirmed by the law.

Upon the third point, the printed argument and the authorities cited were referred to.

Butler, Attorney-General, for the defendant.—Upon the first point presented by the counsel for the plaintiff, it is admitted, that the title of the plaintiffs to the freehold, and to the soil covered by the streets, did not pass to the town of Charlestown, or to the United States, holding under the proceedings instituted to obtain the ground used for a navy yard. But in order to recover in this action, it is necessary that the plaintiffs should show a right to enter on the land, and to possess the same. If the United States acquired a right to use the ground as a navy yard, no such right existed ; and it is contended, that such a use is entirely consistent with the purposes

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for which the appropriation of the ground to public purposes was made. The United States entered and held under the town of Charlestown ; and unless the plaintiffs could recover the soil and possession from the town, no recovery can be had from the defendant. In the act under which the navy yard was established, and *the ground taken, there is an express provision, that if, at any time, the navy yard shall be abandoned, the streets interrupted, and thus temporarily closed, shall be re-established. There is, therefore, a remaining and subsisting right in the town of Charlestown to the streets ; which may be in full operation and effect, at a future time. The claim of the plaintiffs is to the absolute and present ownership of the ground ; and this is altogether inconsistent with the actual state of things, and the rights which rest upon the theme. The use of the soil on which the streets were laid, is not inconsistent with the rights acquired by the United States. There may be an easement as to the soil, as well as in the surface of the land. This exists in a right of way, as the right implies the privilege to use part of the soil, for making and repairing the road—so too, the right to dig a canal—the right to make bricks, and to burn lime.

*49] As to the plaintiffs' first point, that the use of the term "appurtenances," did not carry with it the right to the soil of the streets, it is admitted. The decision of Mr. Justice STORY, referred to by the counsel for the plaintiffs (1 Sum. 21), establishes this. This is also shown by the application of the United States to the town of Charlestown to use the streets for the navy yard ; which was contemporaneous with the proceedings to obtain the land of Harris. It is also admitted, that it is the settled law of Massachusetts, that the right of soil reverts to the owner, if a way is discontinued. This is in harmony with the rule of the common law. But it is denied, that, in this case, there has been such a discontinuance and abandonment of the right of way, as to operate to its extinguishment of surrender.

The United States have a right to the possession of the streets, and to use the soil for the purposes of a navy yard ; and of erecting on the same all the buildings required for the same. This right is derived from the act of 1781. By that act, the soil of the streets was taken for public uses. The establishment of a town, and the purposes of the safety and convenience of the inhabitants, were in the view of those who appropriated the same *50] for streets. The uses of the streets for a navy yard, and *buildings connected with it, were among those for which the streets were laid out and the ground taken.

It is denied, that laws such as this shall be construed strictly. The appropriation made of the streets and the soil in which they were laid out, was one of great public interest. A law which authorizes such an appropriation should have a liberal construction. Such laws are not in derogation of private rights. They effect private rights, but when they operate a great public good, they are not to be confined in their application. This has been decided in New York, in cases where the lands of private persons were taken for the canals of that state. 20 Johns. 735 ; 7 Johns. Ch. 315, 328, 330. These cases show, that where acts are passed, eminently for the public good, they are to be liberally construed.

As the object of the law of 1781 was to allow the ground to be taken for public uses generally, some of those uses are not defined, but they are included in the word " &c." These words include all that is claimed. They

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are inserted in the general provision of the statute, and they are also included in the recital in the 4th section of the act. The argument of the plaintiffs is, that the law only authorized the taking the land for streets; but the "etc." gave more powers, and included other objects. Lord Coke assigns to these words a significant extension, and a powerful meaning. If the words "etc.", had been carried out, the law would have said "for other like purposes." The words "etc.", are equivalent to "other like purposes." Taking the land for public purposes, gave to those who took it the right to use it for the great and important purpose of a navy yard. This is a defence of the whole town of Charlestown; and therefore, of great public benefit. Could not the town of Charlestown have erected defences on the streets? Market-houses and court-houses are often erected on streets; and this is done under a liberal construction of the legislative acts. The erection of a navy yard is fully authorized, by this view of the law.

Under the fourth reserved point, it is contended, that the soil of those streets was dedicated by the ancestor of the plaintiffs to public uses. From 1801 to 1814, there was an acquiescence *in the appropriation made [**51] of the ground by the United States, for a navy yard. Why did not Harris take immediate measures to repossess the land, as soon as the navy yard closed them. From 1801 to 1814, he was alive, during which they were so used. Harris protested to the town of Charlestown, but not to the United States. This was a dedication to public uses of the land—an individual may make such a dedication. 6 Pet. 431.

THOMPSON, Justice, delivered the opinion of the court.—This is an action of trespass, and the declaration contains two counts. In the first count, the *locus in quo* is described as a certain close situated in the town of Charlestown, measuring 400 feet in length and 40 feet in width, formerly called Henley street: and in the second count, the *locus in quo* is described as a close in the same town, measuring 750 feet in length and 40 feet in width, formerly called Battery or Water street. And upon the trial of the cause, the following questions occurred, upon which the opinions of the judges were opposed, and the points have been certified to this court, viz :

1. Whether the soil and freehold of the street called Henley or Meeting-house street, and of the street called Battery or Water street, did or did not pass to the United States, under and by virtue of the term "appurtenances," used by the jury, in their verdict, in description of lot No. 2, or by the description in said verdict of lots Nos. 1 and 3, or by the proceedings by which the land was taken by the United States?

2. Whether the limitations contained in the said statute of October 30th, 1781, is a bar to the plaintiffs' right to recover the soil and freehold of said streets?

3. Whether, upon the discontinuance of a highway in Massachusetts, by the public, the soil and freehold of such highway reverts to the owner of the land taken for such highway?

4. And upon the facts above stated, whether the plaintiffs have any right or title to the land taken for said streets on which the trespass is supposed to have been committed?

It appears from the statement of facts in the case, that in the *year [**52] 1780, a committee, appointed by the town of Charlestown, projected

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certain streets in the town, and laid them down on a plan or map, which was deposited and now remains in the office of the secretary of state of the commonwealth of Massachusetts ; and that on the 30th of October 1781, the legislature of that state passed an act confirming the doings of that committee, and barring actions in certain cases therein specified. John Harris, the ancestor of the plaintiffs, about the year 1793, became the purchaser and owner of certain tracts of land, which comprised the two parcels described in the declaration, and which are parts of the land through which said streets are laid down on the said plan or map, in the year 1780, although, in point of fact, Battery or Water street was not laid out and opened until the year 1795 or '96, and Henley or Meeting-house street not until the year 1798 or '99. These streets passed over the land of John Harris, and he received from the town of Charlestown a compensation in damages, for taking the land belonging to him for the streets. In the year 1800, the government of the United States, under the authority of an act of the legislature of Massachusetts, purchased of John Harris, several parcels of land now included within the limits of the navy yard, in the town of Charlestown ; and in the year 1801, by an arrangement between the town of Charlestown and the United States, these streets so far as they were within the limits of the navy yard, were closed up, and have ever since been discontinued, and ceased to be used as public highways ; and have been used as a part of the navy yard. The act of the legislature of Massachusetts consenting to the purchase, and ceding the jurisdiction, provides, that if the agent of the United States, and the owners of the land so to be purchased, cannot agree in the sale and purchase thereof, application may be made to any court of general sessions of the peace of the county of Middlesex, which court is authorized to summon a jury to value the same. The agent of the United States and John Harris, not agreeing as to the value of the land so taken by the United States, the same was ascertained by a jury, duly summoned according to the provisions of the act ; and by the proceedings of the jury for that purpose, and the return made thereupon, five lots *53] of land were appraised, which belonged to *John Harris, which are particularly described by metes and bounds, and some parts of the land so appraised, are bounded upon and by the said streets ; but no part of the *locus in quo* in either count in the declaration is included within such bounds and description. The description of one of the lots so taken and appraised, begins as follows : "One other lot of land, with the *appurtenances*, containing one-half of an acre, bounded as follows," &c., particularly describing the lot, but not including the highway ; and one of the questions arising under the first point is, whether under the term *appurtenances*, the soil and freehold of the street passed to the United States. This term is not used in the description of either of the other lots. The inquest of the jury, after particularly describing, by metes and bounds, each lot, concludes in each case as follows : "Which same tract of land, on our oaths, we appraise and value at —," and the act of the legislature of Massachusetts declares, that such parts of the land so valued and paid for by the United States, shall be for ever vested in the United States, and shall and may be taken possession of and appropriated to the purposes aforesaid. This inquest, therefore, shows, that the jury appraised the land only included within the description, and the act only vests the title to such land as shall

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be appraised. The streets were clearly not appraised, and so did not pass to the United States; unless they passed as an incident, under the term "appurtenances." If, from the use of this term, connected with and explained by the other parts of the inquest, it clearly appeared to have been the intention of the jury to include the streets; it might be considered a part of, and explanatory of the description, and be carrying into effect the intention of the jury; but if no such conclusion can be draw, the term must receive its legal and appropriate interpretation. There is no ambiguity in the description of the lot, necessary to be explained; and it is difficult to conjecture, what could have been the understanding of the draughtsman, by the use of the term. It is not introduced in the description of any of the other lots. It does, to be sure, appear, that there was upon this lot several houses, and none upon any of the other lots; and it is not unlikely that it was intended to apply to the buildings upon the lot; but this was unnecessary, as they would pass *with the land; although, from the facts, as disclosed in the case, we cannot discover any appropriate [*54 application of the term, yet we cannot undertake to say, that there was not any right or interest incident to this lot, which would pass under the term "appurtenances." But there is no ground to warrant a construction, that it was used in reference to the soil and freehold of the street, or anything to take it out of the strict, legal and technical interpretation of the term. This term, both in common parlance and in legal acceptation, is used to signify something appertaining to another thing as principal, and which passes as an incident to the principal thing. Lord COKE says (Co. Litt. 121 b), a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. According to this rule, land cannot be appurtenant to land. In the case of *Jackson v. Hathaway* (15 Johns. 454), the court say, it is impossible to protect the defendant, on the ground that the adjoining road passed by the deed, as an incident to the lands professedly granted. A mere easement may, without express words, pass as an incident to the principal object of the grant; but it would be absurd, to allow the fee of one piece of land, not mentioned in the deed, to pass as appurtenant to another distinct parcel, which is expressly granted by precise and definite boundaries. And in the case of *Leonard v. White* (7 Mass. 6), it was decided, that by the grant of a grist-mill, with the appurtenances, the soil of a way, immemorially used for the purpose of access to the mill, did not pass; although it might be considered as a grant of the easement, for the accommodation of the mill. (Cro. Eliz. 704; Cro. Car. 57; 3 Salk. 40.) The answer, therefore, to this branch of the question, must be, that the soil and freehold of the streets did not pass, under and by virtue of the term "appurtenances," nor is there anything in the description of lots Nos. 1 and 3, in the verdict of the jury, nor in the proceedings by which the land was taken by the United States, from which it can be inferred, that the soil and freehold of the streets passed to the United States. It has been shown, by the notice already taken of the verdict and proceedings, that they do not include the streets. The same answer must, therefore, be given to this branch of the question.

2. That part of the act of the 30th October 1781, under which [*55 *the second question arises, is as follows: § 1. "That the said proceedings of the committee be and hereby are confirmed, and all actions

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that shall be brought for recovering possession of any land lying within any of the streets, lanes, squares, &c., laid out as aforesaid, or for damages sustained or occasioned thereby, shall be utterly and for ever barred." The preamble to this act refers to the destruction of Charlestown by fire, and that a committee had been appointed by the town for regulating the streets, lanes and squares in that part of the town which had been laid waste by the fire; and that the committee had proceeded to lay out the same, a plan of which had been deposited in the secretary's office. This preamble states, that the committee was appointed to regulate the streets, which might not, perhaps, in strictness, authorize them to alter the streets; but the act, in several parts of it, evidently looks to, and provides for, cases where the streets were widened and altered. This mode of laying out streets was not according to the general law of Massachusetts, and the object of the act was, to legalize and confirm the proceedings of the committee, and to bar all actions to recover possession of any land so taken for streets, lanes, squares, &c., or for damages sustained by any one thereby. This bar of all actions was, to protect and establish the doings of the committee in laying out the streets; but does not seem to look to any question relating to the soil and freehold of the streets, if the easement should, at any time thereafter, be discontinued. This question is not stated with precision, and might, perhaps, admit of a more general view of the act of 1781, and open the inquiry, whether the right of the plaintiffs to the soil and freehold of the streets was not taken away by it; but as the cause must go back for further proceedings, we do not think proper to enter into the more general consideration of this act, or touch the question as to its effect upon the plaintiffs' right to the soil and freehold of the streets. But only decide that such right, if it exists, is not barred by the first section of the act.

3. Upon the third point, the law in Massachusetts is well settled, that where a mere easement is taken for a public highway, the soil and freehold remains in the owner of the land, incumbered only with the easement, and [56] that upon the discontinuance *of the highway, the soil and freehold revert to the owner of the land. (4 Mass. 427; 6 Ibid. 454; 13 Ibid. 259; 16 Ibid. 33.)

4. The fourth question is too general, embracing the merits of the whole case, and does not present any single point or question; and it has been repeatedly ruled in this court, that the whole case cannot be brought here, under the act of 1802, upon such a general question. This act provides only for bringing up, in this manner, specific questions, upon which the judges in the circuit court may be opposed in opinion.

Several questions growing out of the facts in this case have been suggested at the bar, deserving consideration; but they are not stated in such specific points as is required by the settled course of the court, and no opinion will, of course, be expressed upon them.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and on the points and questions on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court,

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on the first question so certified as aforesaid, that the soil and freehold of Henley or Meeting-house street, and of Battery or Water street, did not pass, under and by virtue of the term "appurtenances," used by the jury in their verdict, nor was there anything in the description of lots one and three, in the verdict of the jury, that passed the soil and freehold of the said streets to the United States. 2. On the second point, it is the opinion of this court, that the right of the plaintiffs to recover the soil and freehold of the said streets is not barred by the limitations contained in the statute of October 30th, 1781, as set forth in the record. 3. On the third point, it is the opinion of this court, that upon the discontinuance of a highway in Massachusetts by the public, the soil and freehold of such highway revert to the owner of the land taken for such highway. 4. *On the fourth ^[*57] question, no specific point being stated, this court can express no opinion, as it has been repeatedly ruled in this court, that the whole case cannot be brought here, under the act of congress of 1802, upon such a general question. Whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court.

*The Lessee of ENOCH TUOKER and RICHARD THOMPSON, Plaintiff ^[*58] in error, v. ELIZA G. MORELAND.

Infancy.

B. being seized of a fee in certain real estate in the city of Washington, on the 1st of December 1831, executed a deed to R. W.; the deed recited, as the consideration, that B., with one Bing, was indebted to T. & T. in the sum of \$3238, for which a promissory note had been given, to secure the payment of which, the conveyance was made to W., in trust, to sell the property in case of the non-payment of the debt; and the same was sold, on the 7th of March 1833, for that purpose by W. as trustee, and was by him conveyed to T. & T., the purchasers; B. continued in possession of the property, until February 8th, 1833, when he conveyed it, with other property, to his mother, E. G. M., in consideration of \$1128 due to her (for which a suit had been instituted) and of other advances made to him; at the time of the sale by W., notice was given of the title of E. G. M. to the premises, and she publicly claimed the same as her absolute right. Evidence, at the trial of an ejectment brought by T. & T. against E. G. M., was given, to prove that, at the time of the execution of the deed by B. to W., B. was *an infant* under twenty-one years of age; and that at the time the deed to E. G. M. was made, he was of full age.

The decision of Lord Mansfield, in *Zouch v. Parsons*, 3 Burr. 1804, was perfectly correct; the act of the infant which was held valid by the court, was precisely such an act as the infant was bound to do, and would have been compelled to do by a court of equity.

The deed given by B. to E. G. M. was a complete disaffirmance and avoidance of his prior deed to W.; and the deed of W. to T. & T. did not convey such a title to them, as would enable them to sustain an action of ejectment for the property.

To assume, as a matter of law, that a voluntary and deliberate recognition, by a person, after his arrival at age, of an actual conveyance of his right, during his nonage, amounts to a confirmation of such conveyance; or to assume, that a mere acquiescence in the same conveyance, without objection, for several months after his arrival at age, is also a confirmation of it, are not maintainable; the mere recognition of the fact, that a conveyance has been made, is not, *per se*, proof of a confirmation of it.¹

¹ There is a well-recognised distinction between the nature of those acts which are necessary to avoid an infant's deed, and the character of those which are sufficient to confirm it. The authorities frequently assert

that such a deed cannot be avoided, except by some act equally solemn with the deed itself. Some assert that it cannot be done by anything short of an entry; and this, whether the deed operates by livery of seisin, or transmits the

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It is apparent, upon the English authorities, that however true it may be, that an infant may so bind himself by deed, in certain cases, as that in consequence of the solemnity of the instrument, it is voidable only, and not void; yet that the instrument, however solemn, is held to be void, if, upon its face, it be apparent that it is to the prejudice of the infant.

There is no doubt, that an infant may avoid his act, deed or contract, by different means, according to the nature of the act, or the circumstances of the case; he may sometimes avoid it, by matters *in pais*, as in case of a feoffment, by an entry, if his entry is not tolled; sometimes by plea, as when he is sued upon his bond or other contract; sometimes by suit, as when he disaffirms a contract made for the sale of his chattels, and sues for the chattels; sometimes by a writ of error, as when he has levied a fine during his nonage; sometimes by a writ of *audita querela*, as *when he has acknowledged a recognisance, or statute-*^{59]} staple, or merchant; sometimes, as in the case of an alienation of his estate, by a writ of entry, *dum fuit in'rd astatem*, after his arrival at age.

When the act of the infant is by matter of record he must avoid it by some act of record (as, for instance, by a writ of error, or an *audita querela*), during his minority; but if the act of the infant is a matter *in pais*, it may be avoided by an act *in pais* of equal solemnity or notoriety; and this, according to some authorities, either during his nonage, or afterwards; and according to others, at all events, after his arrival of age.

The deed of B. to E. G. M., being of as high a nature as the original deed to W., was a valid disaffirmance of the first deed.

In many cases, the disaffirmance of a deed, made during infancy is a fraud upon the other party; but this has never been held to be sufficient to avoid the disaffirmance; for it would otherwise take away the very protection, which the law intends to throw around him to guard him from the effects of his folly, rashness and misconduct.

ERROR to the Circuit Court of the District of Columbia, in the county of Washington. An action of ejectment was instituted in the circuit court, for the recovery of certain real estate in the city of Washington, claimed by the plaintiffs in error, under a deed executed by Richard N. Barry, on the first day of December 1831, to Richard Wallach.

The deed recited, that Richard N. Barry and George Bing stood indebted to Tucker & Thompson, of the city of Washington, in the sum of \$3238, for which they had passed to them their joint and several promissory note, payable in six months; and to secure the payment of which note, with the interest, in twelve months, Richard N. Barry had agreed to execute the same. The deed, then, conveyed to Richard Wallach and his heirs, the property in controversy; in trust, to sell and dispose of the same, and after appropriating the proceeds of the sale to the payment of the debt and interest, and expenses of sale, to pay over the residue to the grantor. It also contained covenants on the part of Barry, to keep the buildings on the premises insured against loss by fire, and to transfer the policies to the trustee; and for further or other deeds of conveyance to the pur-

title by virtue of the statute of uses. Others hold, that it may be avoided, without a previous entry, by another deed made to a different grantee. But all the authorities recognise the doctrine, that acts which would be insufficient to avoid such a deed, may amount to an affirmation of it. *Irvine v. Irvine*, 9 Wall. 627. There is reason for this distinction between the effect of acts in avoidance, and that of acts of confirmation. An infant's deed is not void; it passes the title of the land to his grantees. Now, if the deed be avoided, the ownership

of the land is retransferred; the *seisin* is changed. There is fitness in a rule, that title to land shall not pass by acts less solemn than a deed; that its ownership shall not be divested by anything inferior to that which conferred it. On the other hand, a confirmation passes no title; it effects no change of property; it disturbs no *seisin*. It is, therefore, itself an act of a character less solemn than is the act of avoiding a deed, and it may well be effected in a less formal manner. *Ibid. 628.*

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chasers of the premises, in order to carry the purposes of the trust into complete effect.

The defendant derived title to the same property, under a deed of indenture, executed by the same Richard N. Barry, on the 8th of February 1833, by which the premises in controversy, and *other lots of ground, were conveyed to her, she being the mother of Richard N. Barry, in consideration of the sum of \$1138.61, which he owed to the said Eliza G. Moreland, for the recovery of which she had instituted a suit in the circuit court of the United States for the district of Columbia, and of other sums of money, by her to him, from time to time, paid and advanced, a particular account of which had not been kept."

On the trial of the cause, it was admitted, that Barry was seised in fee of the premises, when he executed the deed to Richard Wallach; and that after the execution thereof, he continued in possession, until the 8th of February 1833, when the deed to the defendant was made, and which deed was duly recorded. Evidence was also given by the defendant, tending to prove, that under the deed to her, she took possession of the premises, and continued to hold possession of the same, up to the time of the trial of the cause. The plaintiffs gave evidence to the jury, to prove that Richard Wallach, the trustee mentioned in the before-mentioned deed of trust, duly advertised the sale of the lot and premises in the declaration mentioned, and sold the same to the plaintiffs, on the 23d of February 1833; and made to them a deed for the same, on the 7th day of March 1833.

The defendant gave evidence to prove that, at the time of the sale made by Richard Wallach as aforesaid, the said defendant gave public notice of her title to the said lot and premises, and there publicly claimed the same as of her absolute right. Upon which said evidence, so admitted and given, the counsel for the defendant prayed the court to instruct the jury, that if they believed the evidence, so admitted and given as aforesaid, to be true, that then they ought to find their verdict for the defendant; which instruction the court refused to give. To this refusal, the defendant excepted.

In addition to the evidence given as aforesaid, the defendant gave evidence to the jury, to prove that, at the time the said Richard Barry made and executed his deed, as hereinbefore mentioned, to Richard Wallach, of the 1st December 1831, he the said Richard Barry was an infant, under the age of twenty-one years, and that at the time he made his deed to the defendant, of the 8th of February 1833, before mentioned, he, the said Richard Barry, was of full age, that is to say, upwards of twenty-one years of age. Whereupon, the counsel for the defendant prayed the court to instruct the jury, that if, upon the whole evidence aforesaid, so given to the jury, they should believe the facts to be as stated as aforesaid; then the deed from the said Richard Wallach to the plaintiffs, as hereinbefore mentioned, did not convey to the said plaintiffs any title which would enable them to sustain this action. Which instruction the court gave, and to which, the plaintiffs, by their counsel, excepted.

The plaintiff, further to maintain and prove the issue on his side, then gave in evidence, by competent witnesses, facts tending to prove, that the said Richard N. Barry had attained the full age of twenty-one years on the 14th day of September 1831; and that in the month of November 1831, the said defendant, who was the mother of the said Richard, did assert and

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declare, that said Richard was born on the 14th day of September 1810 ; and that she did assert to Dr. McWilliams, a competent and credible witness, who deposed to said facts, and who was the accoucheur attending on her, at the period of the birth of her said son, that such birth actually occurred on the said 14th of September 1810 ; and applied to said Dr. McWilliams to give a certificate and deposition that the said day was the true date of the said birth. The counsel of the plaintiffs requested the court to instruct the jury—

1. That if the jury shall believe from the said evidence, that the said Richard N. Barry was of full age, and above the age of twenty-one years, at the time of the execution of said deed to said Wallach; or, if the defendant shall have failed to satisfy the jury from the evidence, that said Barry was, at the said date, an infant under twenty-one years ; that then the plaintiff is entitled to recover.

2. Or, if the jury shall believe from the said evidence, that if said Richard was under age, at the time of the execution of said deed, that he did, after his arrival at age, voluntarily and deliberately recognise the same as an *62] actual conveyance of his *right, or during a period of several months, acquiesce in the same, without objection ; that then said deed cannot now be impeached on account of the minority of the grantor.

3. That the said deed from the said Richard N. Barry to the defendant, being made to her with full notice of said previous deed to said Wallach, and including other and valuable property, is not so inconsistent with said first deed, as to amount to a disaffirmance of the same.

4. That from the relative positions of the parties to said deed to defendant, at and previous to its execution, and from the circumstances attending it, the jury may infer that the same was fraudulent and void.

5. That if the lessors of plaintiff were induced, by the acts and declarations of defendant, to give a full consideration for said deed to Wallach, and to accept such deed as a full and only security for the debt *bond fide* due to them, and property *bond fide* advanced by them, and to believe that the said security was valid and effective ; that then it is not competent for said defendant, in this action, to question or deny the title of said plaintiff under said deed ; whether the said acts and declarations were made fraudulently, and for the purpose of practising deception, or whether said defendant, from any cause, wilfully misrepresented the truth.

Whereupon, the court gave the first of the said instructions so prayed as aforesaid, and refused to give the others. To which refusal, the counsel for the plaintiff excepted.

The court having refused the 2d, 3d, 4th and 5th instructions prayed by the plaintiff, and the counsel, in opening his case to the jury, contending, that the questions presented by the said instructions were open to the consideration of the jury, the counsel for the defendant thereupon prayed the court to instruct the jury, that if, from the evidence so as aforesaid given to the jury, and stated in their prayers for the said instructions, they should be of opinion, that the said Richard was under the age of twenty-one years, at the time he made his deed, as aforesaid, to the said Richard Wallach, under whom the plaintiffs claim their title in this case ; and that at the time *63] he made his deed, as hereinbefore mentioned, to the *defendant, he was of full age, that such last-mentioned deed was a disaffirmance of

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his preceding deed to him, the said Richard Wallach ; and that, in such case, the jury ought to find their verdict for the defendant ; and that the evidence upon which the 2d, 3d, 4th and 5th instructions were prayed by the plaintiff as aforesaid, which evidence is set forth in the instructions so prayed, is not competent in law to authorize the jury to find a verdict for the plaintiff, upon any of the grounds, or for any of the reasons, set forth in the said prayers ; or to authorize them to find a verdict for the plaintiff, if they should be of opinion, that the said Richard Barry was under the age of twenty-one years, at the time he made his deed, as aforesaid, to the said Richard Wallach. Which instruction the court gave, as prayed ; and the counsel for the plaintiffs excepted thereto. The plaintiffs prosecuted this writ of error.

The case was argued by *Coze*, for the plaintiff in error ; and by *Swann* and *Bradley*, for the defendant.

For the *plaintiffs*, it was contended, that the circuit court erred in giving the instructions prayed by the defendant, and in refusing the instructions prayed by the plaintiff. That the deed of an infant is not void, but merely voidable. That there was competent and sufficient evidence before the jury, from which they might infer, that if the grantor, Richard N. Barry, was, in fact, an infant, at the date of the deed to Richard Wallach, he had affirmed the deed, after he came of age. If the grantor, Richard N. Barry, was, at the date of the deed to Richard Wallach, an infant, the defendant was guilty of a fraud ; of which he could not avail himself to defeat the recovery of the plaintiffs in this action. The circuit court erred in considering the acts of an infant, which are voidable by him, on attaining full age, absolutely void in themselves. The acts of an infant are voidable, not void ; cited, 3 Burr. 1794 ; s. c. 1 W. Bl. 575.

If an infant does an act which is voidable, he cannot recall it, without repaying the consideration he received for the first conveyance. He can only reinstate himself, by reinstating the person from whom he claims what he had conveyed to him, in all he *had obtained from him. The disposition of court to restrain the power of infants within this rule, has [*64 been manifested by the latter decisions of courts, in which such questions have been decided. The protection of infants which courts have given, is a shield of defence, and is not to be used as a weapon to injure others ; cited, 7 Cow. 179, 181 ; 15 Mass. 359 ; 13 Ibid. 37 ; 2 Evans's Pothier, note 26.

But whatever may be the power of Barry over the deed executed to Mr. Wallach, the defendant cannot avail herself of the infancy of her son, to sustain a title derived from him, against one held under the deed of trust. She had excluded herself from denying the full age of her son, by asserting that it existed, before he made the deed of trust, and procuring it to be admitted by the orphans' court, when Barry claimed, and, under the authority of that court, obtained the possession of his property, as being of full age. The plaintiff had a right to submit these facts, and to have the benefit of them before the jury ; and this was denied to him by the circuit court.

Bradley and *Swann*, for the defendant, denied that the case of *Zouch v. Parsons* (3 Burr. 1794) sustained the principle claimed under it by the plaintiffs' counsel. That case had no application to such a conveyance as

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was made to Mr. Wallach; which was a deed creating a trust, with covenants, into which an infant cannot enter. The authority of the case of *Zouch v. Parsons* has been questioned and denied (2 Preston on Conveyancing, 24).

But if the deed to Mr. Wallach was only voidable, full evidence of its disaffirmance is given, by the execution of the deed to the defendant; which contains a covenant of warranty, as well as a covenant of title. He was in possession, when he executed this conveyance. To show how a deed given by an infant can be avoided, when he attains full age: cited, 14 Johns. 124. In all cases of affirmation of his acts while an infant, on his attaining full age, his affirmation must be express: cited, 1 Johns. Cas. 127. The cases show that a deed of bargain and sale given by an infant, may be disaffirmed by a deed of bargain and sale, when *he attains full age.
*65] In the case before the court, more has been done: a deed has been executed, with covenants of warranty and title; the grantee has had possession ever since the conveyance.

The charge of fraud could not be sustained. At the time of the application to the orphans' court, a mistake was made as to the age of Richard N. Barry, which was afterwards discovered. But the plaintiffs cannot avail themselves of those circumstances. The validity of the deed of trust depended on the age of the grantor; and this was the question properly before the court and jury. The deed to the defendant was given for a fair and valuable consideration, and it is a valid deed; if, when the prior deed was executed, the grantor was an infant. To this extent, and no more, were the instructions of the circuit court given; and they are sustained by the soundest principles of law.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court for the county of Washington, and district of Columbia. The original action was an ejectment brought by the plaintiff in error, against the defendant in error; and both parties claimed title under Richard N. Barry. At the trial of the cause, upon the general issue, it was admitted, that Richard N. Barry, being seised in fee of the premises sued for, on the first day of December 1831, executed a deed thereof to Richard Wallach. The deed, after reciting that Barry and one Bing were indebted to Tucker & Thompson in the sum of \$3238, for which they had given their promissory note, payable in six months after date, to secure which the conveyance was to be made, conveyed the premises to Wallach, in trust to sell the same, in case the debt should remain unpaid, ten days after the first day of December then next. The same were accordingly sold by Wallach, for default of payment of the note, on the 23d of February 1833, and were bought at the sale by Tucker & Thompson, who received a deed of the same, on the 7th of March of the same year. It was admitted, that after the execution of the deed of Barry to Wallach, the former continued in possession of the premises, until the 8th of February 1833, when
*66] he *executed a deed, including the same and other parcels of land, to his mother, Eliza G. Moreland, the defendant, in consideration (as recited in the deed) of the sum of \$1138.61, which he owed his mother; for the recovery of which she had instituted a suit against him, and of other sums advanced him, a particular account of which had not been kept, and

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of the further sum of five dollars. At the time of the sale of Wallach, the defendant gave public notice of her title to the premises, and she publicly claimed the same as her absolute right. The defendant further gave evidence at the trial, to prove, that at the time of the execution of the deed by Barry to Wallach, he, Barry, was an infant, under twenty-one years of age ; and at the time of the execution of the deed to the defendant, he was of the full age of twenty one years.

Upon this state of the evidence, the counsel for the defendant prayed the court to instruct the jury, that if, upon the whole evidence given as aforesaid to the jury, they should believe the facts to be as stated as aforesaid, then the deed from the said Wallach to the plaintiffs did not convey to the plaintiffs any title, which would enable them to sustain the action. This instruction the court gave ; and this constitutes the exception now relied on by the plaintiff in error, in his first bill of exceptions.

Some criticism has been made upon the language in which this instruction is couched. But, in substance, it raises the question, which has been so fully argued at the bar, as to the validity of the plaintiffs' title to recover, if Barry was an infant at the time of the execution of his deed to Wallach. If that deed was originally void, by reason of Barry's infancy, then the plaintiff, who must recover upon the strength of his own title, fails in that title. If, on the other hand, that deed was voidable only, and not void, and yet it has been avoided by the subsequent conveyance to the defendant, by Barry, then the same conclusion follows. And these, accordingly, are the considerations which are presented under the present instruction.

In regard to the point, whether the deed of lands by an infant is void or voidable at the common law, no inconsiderable diversity of opinion is to be found in the authorities. That *some deeds or instruments, under seal, of an infant, are void, and others voidable, and others valid [^{*67} and absolutely obligatory, is not doubted. Thus, a single bill, under seal, given by an infant for necessaries, is absolutely binding upon him ; a bond, with a penalty, for necessaries, is void, as apparently to his prejudice ; and a lease reserving rent, is voidable only.(a) The difficulty is in ascertaining the true principle, upon which these distinctions depend. Lord MANSFIELD, in *Zouch v. Parsons* (3 Burr. 1804), said, that it was not settled, what is the true ground, upon which an infant's deed is voidable only ; whether the solemnity of the instrument is sufficient, or it depends upon the semblance of benefit, from the matter of the deed, upon the face of it. Lord MANSFIELD, upon a full examination of the authorities, on this occasion, came to the conclusion (in which the other judges of the court of king's bench concurred), that it was the solemnity of the instrument, and delivery by the infant himself, and not the semblance of benefit to him, that constituted the true line of distinction between void and voidable deeds of the infant ; but he admitted, that there were respectable sayings the other way. The point was held by the court, not necessary to the determination of that case ; because, in that case, the circumstances showed that there was a semblance of benefit sufficient to make the deed voidable only, upon the matter of the conveyance. There can be little doubt, that the decision in *Zouch v.*

(a) See *Russel v. Lee*, 1 Lev. 86; *Fisher v. Mowbray*, 8 East 880; *Baylis v. Dinely*, 3 M. & Selw. 470; Co. Litt. 172.

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Parsons was perfectly correct ; for it was the case of an infant mortgagee, releasing, by a lease and release, his title to the premises, upon the payment of the mortgage-money, by a second mortgagee, with the consent of the mortgagor. It was precisely such an act as the infant was bound to do ; and would have been compelled to do, by a court of equity, as a trustee of the mortgagor. And certainly, it was for his interest to do, what a court of equity would by a suit have compelled him to do.(a)

Upon this occasion, Lord MANSFIELD and the court approved of *68] *the law as laid down by Perkins (§ 12), that " all such gifts, grants or deeds, made by infants, which do not take effect by delivery of his hand, are void. But all gifts, grants or deeds, made by infants, by matter of deed, or in writing, which do take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate." And in Lord MANSFIELD's view, the words " which do take effect," are an essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power, and convey no interest.(b) So that, according to Lord MANSFIELD's opinion, there is no difference between a feoffment and any deeds which convey an interest. In each case, if the infant makes no feoffment, or delivers no deed in person, it takes effect by such delivery of his hand, and is voidable only. But if either act be done, by a letter of attorney from the infant, it is void, for it does not take effect by a delivery of his hand.

There are other authorities, however, which are at variance with this doctrine of Lord MANSFIELD, and which put a different interpretation upon the language of Perkins. According to the latter, the semblance of benefit to the infant, or not, is the true ground of holding his deed voidable or void. That it makes no difference, whether the deed be delivered by his own hand or not ; but whether it be for his benefit or not. If the former, then it is voidable ; if the latter, then it is void. And that Perkins, in the passage above stated, in speaking of gifts and grants taking effect by the delivery of the infant's hand, did not refer to the delivery of the deed, but to the delivery of the thing granted ; as, for instance, in the case of a feoffment, to a delivery of seisin by the infant personally ; and in case of chattels, by a delivery of the same by his own hand. This is the sense in which the doctrine of Perkins is laid down in Sheppard's Touchstone 232. Of this latter opinion, also, are some other highly respectable text-writers ;(c) and perhaps, *69] the weight of *authority, antecedent to the decision in *Zouch v. Parsons*, inclined in the same way. Lord Chief Justice EYRE, in *Keane v. Boycott* (2 H. Bl. 515), alluded to this distinction, in the following terms : After having corrected the generality of some expressions in Litt. § 259, he added, " We have seen, that some contracts of infants, even by deed, shall

(a) See —— v. Handcock, 17 Ves. 888; 1 Fonbl. Eq. b. 1, ch. 2, § 5, and notes. Co. Litt. 172 a; Com. Dig. Infant, B. 5.

(b) See Saunderson v. Marr, 1 H. Bl. 75.

(c) See Preston on Conveyancing 248-50; Com. Dig. Enfant, C. 2; Shep. Touch. 232, and Acherly's note; Bac. Abr. Infancy, I. 8; English Law Journal for 1804, p. 145; 8 Amer. Jurist 327. But see 1 Powell on Mort., by Coventry, note to p. 208; *Zouch v. Parsons*, 1 W. Bl. 575, Ellsley's notes, h and e; Co. Litt. 51 b, Harg. note, 881; *Holmes v. Blogg*, 8 Taunt. 508; 1 Fonbl. Eq. b. 1, ch. 11, § 8, and notes g, s, a, b.

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bind them; some are merely void, namely, such as the court can pronounce to be to their prejudice; others, and the most numerous class, of a mere uncertain nature as to benefit or prejudice, are voidable only; and it is in the election of the infant to affirm them or not. In Roll. Abr. tit. *Enfants* (1 Roll. Abr. 728), and in Com. Dig., under the same title, instances are put of the three different kinds, of good, void and voidable contracts. Where the contract is by deed, and not apparently to the prejudice of the infant, Comyn states it as a rule, that the infant cannot plead *non est factum*, but must plead his infancy. It is his deed; but this is a mode of disaffirming it. He, indeed, states the rule generally; but I limit it to that case, in order to reconcile the doctrine of void and voidable contracts." A doctrine of the same sort was held by the court, in *Thompson v. Leach*, 3 Mod. 310; in *Fisher v. Mowbray*, 8 East 330; and *Baylis v. Dinely*, 3 M. & Selw. 477. In the last two cases, the court held, that an infant cannot bind himself in a bond with a penalty, and especially to pay interest. In the case of *Baylis v. Dinely*, Lord ELLENBOROUGH said, "In the case of the infant lessor, that being a lease, rendering rent, imported, on the face of it, a benefit to the infant; and his accepting the rent, at full age, was conclusive that it was for his benefit. But how do these authorities affect a case like the present, where it is clear, upon the face of the instrument, that it is to the prejudice of the infant, for it is an obligation with a penalty, and for the payment of interest? Is there any authority to show, that if, upon looking to the instrument, the court can clearly pronounce, that it is to the infant's prejudice, they will, nevertheless, suffer it to be set up by matter *ex post facto*, after full age?" And then, after commenting on *Keane v. Boycott*, and *Fisher v. Mowbray*, he added, "In *Zouch v. Parsons*, where this subject was much considered, I find nothing which tends to show that an infant may bind himself *to his prejudice. It is the privilege of the infant, [*70] that he shall not; and we should be breaking down the protection which the law has cast around him, if we were to give effect to a confirmation by parol, of a deed like this, made during his infancy."

It is apparent, then, upon the English authorities, that however true it may be, that an infant may so far bind himself by deed, in certain cases, as that in consequence of the solemnity of the instrument, it is voidable only, and not void; yet that the instrument, however solemn, is held to be void, if, upon its face, it is apparent, that it is to the prejudice of the infant. This distinction, if admitted, would go far to reconcile all the cases; for it would decide, that a deed, by virtue of its solemnity, should be voidable only, unless it appeared on its face, to be to his prejudice, in which case, it would be void.(a)

The same question has undergone no inconsiderable discussion in the American courts. In *Oliver v. Houdlet*, 13 Mass. 239, the court seemed to think the true rule to be, that those acts of an infant are void, which not only apparently, but necessarily, operate to his prejudice. In *Whitney v. Dutch*, 14 Mass. 462, the same court said, that whenever the act done may be for the benefit of the infant, it shall not be considered void; but that he shall have his election, when he comes of age, to affirm or avoid it. And they added, that this was the only clear and definite proposition, which can

(a) See Bac. Abr., Infancy and Age, I. 8, L. 7.

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be extracted from the authorities. (a) In *Conroe v. Birdsall*, 1 Johns. Cas. 127, the court approved of the doctrine of Perkins, § 12, as it was interpreted and adopted in *Zouch v. Parsons*, and in the late case of *Roof v. Stafford*, 7 Cow. 180–81, the same doctrine was fully recognised. But in an intermediate case, *Jackson v. Burchin*, 14 Johns. 126, the court doubted, whether a bargain and sale of lands, by an infant, was a valid deed to pass the land, as it would make him stand seised to the use of another. And that doubt was well warranted by what is laid down in 2 Inst. 673, where it is said, that if an infant bargain and sell lands, which are in the realty, by deed indented and enrolled, he may avoid it, when he will, for the deed was of no effect to raise a use.

*The result of the American decisions has been correctly stated *71] by Mr. Chancellor Kent, in his learned commentaries (2 Com. Lect. 31), to be, that they are in favor of construing the acts and contracts of infants, generally, to be voidable only, and not void, and subject to their election, when, they become of age, either to affirm or disallow them; and that the doctrine of *Zouch v. Parsons* has been recognised and adopted as law. It may be added, that they seem generally to hold, that the deed of an infant, conveying lands, is voidable only, and not void; unless, perhaps, the deed should manifestly appear, on the face of it, to be to the prejudice of the infant; and this, upon the nature and solemnity, as well as the operation of the instrument.

It is not, however, necessary for us, in this case, to decide, whether the present deed, either from its being a deed of bargain and sale, or from its nature, as creating a trust for a sale of the estate, or from the other circumstances of the case, is to be deemed void, or voidable only. For if it be voidable only, and has been avoided by the infant, then the same result will follow, that the plaintiff's title is gone.

Let us, then, proceed to the consideration of the other point, whether, supposing the deed to Wallach to be voidable only, it has been avoided by the subsequent deed of Barry to Mrs. Moreland. There is no doubt, that an infant may avoid his act, deed or contract, by different means, according to the nature of the act, and the circumstances of the case. He may sometimes avoid it by matter *in pais*, as in case of a feoffment, by an entry, if his entry is not tolled; sometimes by plea, as when he is sued upon his bond or other contract; sometimes by suit, as when he disaffirms a contract made for the sale of his chattels, and sues for the chattels; sometimes by a writ of error, as when he has levied a fine during his nonage; sometimes by a writ of *audita querela*, as when he has acknowledged a recognisance or statute-staple or merchant; (b) sometimes, as in the case of an alienation of his estate during his nonage, by a writ of entry, *dum fuit infra etatem*, after his arrival of age. The general result seems to be, that where the act *72] of the infant is by matter of record, he *must avoid it by some act of record (as for instance, by a writ of error, or an *audita querela*) during his minority. But if the act of the infant is a matter *in pais*, it may be avoided by an act *in pais*, of equal solemnity or notoriety; and this, accord-

(a) See *Boston Bank v. Chamberlain*, 15 Mass. 220.

(b) See Com. Dig., *Infant*, B. 1, 2, C. 2, 3, 4, 5, 8, 9, 11; 2 Inst. 673; 2 Kent Com. Lect. 31; Bac. Abr., *Infancy and Age*, I 5, I 7.

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ing to some authorities, either during his nonage or afterwards; and according to others, at all events, after his arrival of age.(a) In Co. Litt. 380 b, it is said, "Herein a diversity is to be observed between matters of record done or suffered by an infant, and matters *in fait*; for matters *in fait*, he shall avoid, either within age or at full age, as hath been said; but matters of record, as statutes-merchant, and of the staple, recognisance acknowledged by him, or a fine levied by him, recovery against him, &c., must be avoided by him, viz., statutes, &c., by *audita querela*; and the fine and recovery, by a writ of error, during his minority, and the like." In short, the nature of the original act or conveyance generally governs, as to the nature of the act required to be done in the disaffirmance of it. If the latter be of as high and solemn a nature as the former, it amounts to a valid avoidance of it. We do not mean to say, that in all cases, the act of disaffirmance should be of the same, or of as high and solemn a nature as the original act; for a deed may be avoided by a plea. But we mean only to say, that if the act of disaffirmance be of as high and solemn a nature, there is no ground to impeach its sufficiency. Lord ELLENBOROUGH in *Baylis v. Dinely* (3 Maule & Selw. 481-2), held a parol confirmation of a bond given by an infant, after he came of age, to be invalid; insisting, that it should be by something amounting to an estoppel in law, of as high authority as the deed itself; but that the same deed might be avoided by the plea of infancy. There are cases, however, in which a confirmation may be good, without being by deed; as, in case of a lease by an infant, and his receiving rent after he came of age.(b)

The question, then, is, whether, in the present case, the deed to Mrs. Moreland, being of as high and solemn a nature as the original deed to Wallach, is not a valid disaffirmance of it. We think it is. If it was a voidable conveyance, which had passed *the seisin and possession to Wallach, and he had remained in possession, it might, like a feoffment, have been avoided by an entry by the infant, after he came of age.(c) But in point of fact, Barry remained in possession; and therefore, he could not enter upon himself. And when he conveyed to Mrs. Moreland, being in possession, he must be deemed to assert his original interest in the land, and to pass it in the same manner as if he had entered upon the land and delivered the deed thereon, if the same had been in an adverse possession.

The cases of *Jackson v. Carpenter* (11 Johns. 539), and *Jackson v. Burchin* (14 Ibid. 124), are directly in point, and proceed upon principles, which are in perfect coincidence with the common law, and are entirely satisfactory. Indeed, they go farther than the circumstances of the present case require; for they dispense with an entry, where the possession was out of the party, when he made the second deed. In *Jackson v. Burchin*, the court said, that it would seem, not only upon principle, but authority, that the infant can manifest his dissent in the same way and manner by which he first assented to convey. If he has given livery of seisin, he must

(a) See Bac. Abr., Infancy and Age, I. 3, I. 5, I. 7; Zouch v. Parsons, 8 Burr. 1794; Roof v. Stafford, 7 Cow. 179, 188; Com. Dig., Enfant, C. 9, C. 4, C. 11.

(b) See Bac. Abr., Infancy and Age, I. 8.

(c) See Inhabitants of Worcester v. Eaton, 18 Mass. 875; Whitney v. Dutch, 14 Id. 462.

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do an act of equal notoriety, to disaffirm the first act ; he must enter on the land, and make known his dissent. If he has conveyed by bargain and sale, then a second deed of bargain and sale will be equally solemn and notorious, in disaffirmance of the first.(a) We know of no authority or principle, which contradicts this doctrine. It seems founded in good sense, and follows out the principle of notoriety of disaffirmance, in the case of a feoffment, by an entry ; that is, by an act of equal notoriety and solemnity with the original act. The case of *Frost v. Wolveston* (1 Str. 94) seems to have proceeded on this principle.

Upon these grounds, we are of opinion, that the deed of Barry to Mrs. Moreland was a complete disaffirmance and avoidance of his prior deed to Wallach ; and consequently, the instruction given by the circuit court was *74] unexceptionable. To give effect to such disaffirmance, it was not necessary, that the infant should first place the other party *in statu quo*.

The second bill of exceptions, taken by the plaintiff, turns upon the instructions asked upon the evidence stated therein, and scarcely admits of abbreviation. It is as follows :

"The plaintiff, further to maintain and prove the issue on his side, then gave in evidence, by competent witnesses, facts tending to prove, that the said Richard N. Barry had attained the full age of twenty-one years on the 14th day of September 1831; and that in the month of November 1831, the said defendant, who was the mother of the said Richard, did assert and declare, that said Richard was born on the 14th day of September 1810; and that she did assert to Dr. McWilliams, a competent and credible witness, who deposed to said facts, and who was the accoucheur attending on her at the period of the birth of her said son, that such birth actually occurred on the said 14th of September 1810, and applied to said Dr. McWilliams to give a certificate and deposition that the said day was the true date of the birth ; and thereupon, the counsel for the plaintiff requested the court to instruct the jury.

"1. That, if the said jury shall believe, from the said evidence, that the said Richard N. Barry was of full age, and above the age of twenty-one years, at the time of the execution of said deed to Wallach, or if the defendant shall have failed to satisfy the jury, from the evidence, that said Barry was, at the said date, an infant under twenty-one years, that then the plaintiff is entitled to recover.

"2. Or, if the jury shall believe, from the said evidence, that if said Richard was under age, at the time of the execution of said deed, that he did after his arrival at age, voluntarily and deliberately recognise the same as an actual conveyance of his right, or during a period of several months, acquiesce in the same, without objection, that then the said deed cannot now be impeached, on account of the minority of the grantor.

"3. That the said deed from the said Richard N. Barry to the defendant, being made to her, with full notice of said previous deed to said Wallach, and including other and valuable property, is not so inconsistent with said first deed as to amount to a disaffirmance of the same.

*75] "4. *That, from the relative position of parties to said deed to

(a) See the same point, 2 Kent's Com. Lect. 81.

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defendant, at and previous to its execution, and from the circumstances attending it, the jury may infer that the same was fraudulent and void.

"5. That, if the lessors of the plaintiff were induced, by the acts and declarations of said defendant to give a full consideration for said deed to Wallach, and to accept said deed as a full and only security for the debt *bond fide* due to them, and property *bond fide* advanced by them, and to believe that the said security was valid and effective, that then it is not competent for said defendant, in this action, to question or deny the title of said plaintiff, under said deed, whether the said acts and declarations were made fraudulently, and for the purpose of practicing deception, or whether said defendant, from any cause, wilfully misrepresented the truth. Whereupon, the court gave the first of the said instructions so prayed as aforesaid, and refused to give the others. To which refusal, the counsel for the plaintiff excepted."

The first instruction, being given by the court, is, of course, excluded from our consideration on the present writ of error. The second instruction is objectionable, on several accounts. In the first place, it assumes, as matter of law, that a voluntary and deliberate recognition by a person, after his arrival at age, of an actual conveyance of his right, during his nonage, amounts to a confirmation of such conveyance. In the next place, that a mere acquiescence in the same conveyance, without objection, for several months after his arrival at age, is also a confirmation of it. In our judgment, neither proposition is maintainable. The mere recognition of the fact, that a conveyance has been made, is not, *per se*, proof of a confirmation of it. Lord ELLENBOROUGH, in *Baylis v. Dinely* (3 M. & Selw. 482), was of opinion, that an act of as high a solemnity as the original act was necessary to a confirmation. "We cannot (said he) surrender the interests of the infant into such hands as he may chance to get. It appears to me, that we should be doing so in this case (that of a deed), unless we required the act after full age to be of as great a solemnity as the original instrument." Without undertaking to apply this doctrine to its full extent, and admitting that acts **in pais* may amount to a confirmation of a deed, still we are of opinion, that these acts should be of such a solemn and unequivocal nature [^{*76} as to establish a clear intention to confirm the deed, after a full knowledge that it was voidable ; (a) *d fortiori*, mere acquiescence, uncoupled with any acts demonstrative of an attempt to confirm it, would be insufficient for the purpose. In *Jackson v. Carpenter* (11 Johns. 542-3), the court held, that an acquiescence by the grantor in a conveyance made during his infancy, for eleven years after he came of age, did not amount to a confirmation of that conveyance ; that some positive act was necessary, evincing his assent to the conveyance. In *Curtin v. Patton* (11 Serg. & Rawle 311), the court held, that to constitute a confirmation of a conveyance or contract by an infant, after he arrives of age, there must be some distinct act, by which he either receives a benefit from the contract, after he arrives at age, or does some act of express ratification. There is much good sense in these decisions, and they are indispensable to a just support of the rights of infants, according to the common law. Besides, in the present case, as Barry was in possession

(a) See *Boston Bank v. Chamberlain*, 15 Mass. 220.

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of the premises during the whole period, until the execution of his deed to Mrs. Moreland, there was no evidence to justify the jury in drawing any inference of any intentional acquiescence in the validity of the deed to Wallach.

The third instruction is, for the reasons already stated, unmaintainable. The deed to Mrs. Moreland contains a conveyance of the very land in controversy, with a warranty of the title against all persons claiming under him (Barry), and a covenant, that he had good right and title to convey the same and therefore, is a positive disaffirmance of the former deed.

The fourth instruction proceeds upon the supposition, that if the deed to Mrs. Moreland was fraudulent between the parties to it, it was utterly void, and not merely voidable. But it is clear, that between the parties, it would be binding, and available; however, as to the persons whom it was intended to defraud, it might be voidable. Even, if it was made for the very pur-

*77] pose of defeating the conveyance to Wallach, and was a mere *con-
trivance for this purpose, still it was an act competent to be done by Barry, and amounted to a disaffirmance of the conveyance to Wallach. In many cases, the disaffirmance of a deed made during infancy is a fraud upon the other party. But this has never been held sufficient to avoid the disaffirmance, for it would otherwise take away the very protection which the law intends to throw round him, to guard him from the effects of his folly, rashness and misconduct. In *Saunderson v. Marr* (1 H. Bl. 75), it was held, that a warrant of attorney, given by an infant, although there appeared circumstances of fraud on his part, was utterly void, even though the application was made to the equity side of the court, to set aside a judgment founded on it. So, in *Conroe v. Birdsall* (1 Johns. Cas. 127), a bond made by an infant, who declared at the time, that he was of age, was held void, notwithstanding his fraudulent declaration; for the court said, that a different decision would endanger all the rights of infants. A similar doctrine was held by the court in *Curtin v. Patton* (11 Serg. & Rawle 309-10). Indeed, the same doctrine is to be found affirmed more than a century and a half ago, in *Johnson v. Pie* (1 Lev. 169; s. c. 1 Sid. 258; 1 Keb. 995, 913.(a))

But what are the facts, on which the instruction relies as proof of the deed to Mrs. Moreland being fraudulent and void? They are "the relative positions of the parties to said deed, at and previous to its execution;" that is to say, the relation of mother and son; and the fact that she had then instituted a suit against him, and arrested him, and held him to bail, as stated in the evidence; and "from the circumstances attending the execution of it," that is to say, that Mrs. Moreland was informed by Barry, before his deed to her, that he had so conveyed the said property to Wallach, and that subsequently, and with such knowledge, she prevailed on Barry to execute to her the same conveyance. Now, certainly, these facts alone, could not justly authorize a conclusion, that the conveyance to Mrs. Moreland was fraudulent and void; for she might be a *bona fide* creditor to her son. And the consideration averred in that conveyance showed her to be a creditor, if it was truly stated (and there *was no evidence to contradict it); and if she was a creditor, then she had a legal

(a) See Bac. Abr. Infancy and Age, H; 2 Kent Com. Lect. 81.

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right to sue her son, and there was no fraud in prevailing on him to give a deed to satisfy that debt. It is probable, that the instruction was designed to cover all the other facts stated in the bill of exceptions, though, in its actual terms, it does not seem to comprehend them. But if it did, we are of opinion, that the jury would not have been justified in inferring, that the deed was fraudulent and void. In the first place, the proceedings in the orphans' court may, for aught that appears, have been in good faith; and under an innocent mistake of a year of the actual age of Barry. In the next place, if not so, still the mother and the son were not estopped in any other proceeding, to set up the nonage of Barry, whatever might have been the case as to the parties and property involved in that proceeding. In the next place, there is not the slightest proof, that these proceedings had, at the time, any reference to, or intended operation upon, the subsequent deed made to Wallach; or that Mrs. Moreland was party to, or assisted in, the negotiations or declarations on which the deed to Wallach was founded. Certainly, without some proofs of this sort, it would be going too far to assert, that the jury might infer, that the deed to Mrs. Moreland was fraudulent. Fraud is not presumed, either as a matter of law or fact, unless under circumstances not fairly susceptible of any other interpretation.

The fifth instruction was properly refused by the court, for the plain reason, that there was no evidence in the case of any acts or declarations by Mrs. Moreland to the effect therein stated. It was, therefore, the common case of an instruction asked upon a mere hypothetical statement, *ultra* the evidence.

The third bill of exceptions is as follows: "The court having refused the 2d, 3d, 4th and 5th instructions prayed by the plaintiffs, and the counsel, in opening his case to the jury, contending that the questions presented by the said instructions were open to the consideration of the jury, the counsel for the defendant thereupon prayed the court to instruct the jury, that if, from the evidence so as aforesaid given to the jury, and stated in the prayers for the said instructions, they should be of opinion, that the said Richard was under *the age of twenty-one years, at the time he [*79 made his deed as aforesaid to the said Richard Wallach, under whom the plaintiffs claim their title in this case, and that at the time he made his deed as hereinbefore mentioned to the defendant, he was of full age, that such last-mentioned deed was a disaffirmance of his preceding deed to him, the said Richard Wallach, and that in that case, the jury ought to find their verdict for the defendant, and that the evidence upon which the 2d, 3d, 4th and 5th instructions were prayed by the plaintiff as aforesaid, which evidence is set forth in the instructions so prayed, is not competent in law to authorize the jury to find a verdict for the plaintiff, upon any of the grounds, or for any of the reasons set forth in the said prayers, or to authorize them to find a verdict for the plaintiff, if they should be of opinion, that the said Richard Barry was under the age of twenty-one years, at the time he made his deed as aforesaid to the said Richard Wallach. Which instruction the court gave, as prayed, and the counsel for the plaintiff excepted thereto."

It is unnecessary to do more than to state, that this bill of exceptions is completely disposed of by the considerations already mentioned. It contains no more than the converse of the propositions stated in the second bill of

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exceptions, and the re-assertion of the instructions given by the court in the first bill of exceptions. Upon the whole, it is the opinion of the court, that the judgment of the circuit court ought to be affirmed, with costs.

Judgment affirmed.

*80] WILLIAM H. TRACY and JOHN B. BALESTIER, Plaintiffs in error,
v. SAMUEL SWARTWOUT.

Responsibilities of public officers.

Certain casks of syrup of sugar-cane were imported into the port of New York, and the agent of the importers offered to enter them, and bond the duties, at the rate of fifteen per cent. *ad valorem*; but the collector, acting in entire good faith, under instructions of the secretary of the treasury, refused to allow the syrup to be entered, unless the bonds were given at the rate of three cents per pound; the consignee refused to give the bonds for the higher duty, and the syrup remained in the possession of the collector for a long time, by which its value was greatly deteriorated. On the trial of the cause, evidence was offered, and rejected by the court, to show that the importer was not able to give bonds for the higher duty; but this inability was not made known to the collector, at the time they offered to make the entry. The treasury department became afterwards satisfied that the legal rate of duties was fifteen per cent. *ad valorem*, and on payment of the duty at that rate, the syrup was delivered to the owner. An action was instituted against the collector, to recover damages for the loss sustained by the deterioration of the syrup, and a verdict in conformity with the charge of the court, was given, for nominal damages only.

The circuit court properly rejected the evidence of the plaintiffs' inability to give the bond demanded by the collector; the fact of inability ought to have been made known to the collector, at the time the bond was required.

The secretary of the treasury is bound by the law; and although, in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to the law; yet, neither he nor those who act under him, can dispense with, or alter any of its provisions. It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress.

Where a ministerial officer acts in good faith, he is not liable to exemplary damages for an injury done; but he can claim no further exemption, where his acts are clearly against law.¹ The collector has a right to hold possession of imported goods, until the duties are paid, or secured to be paid, as the law requires; but, if he retain possession of the goods, and refuse to deliver them, after the duties have been paid, or bond given or tendered for the proper rate of duties, he is liable for the damages which may be sustained by this refusal.

A court may not only present the facts proved in their charge to the jury, but give their opinion, as to those facts, for the consideration of the jury; but, as the jurors are the triers of facts, such an expression of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgment; they should be made distinctly to understand, that the instruction was not given as a point of law, by which they were to be governed; but as a mere opinion, as to the facts, and to which they should give no more weight than it was entitled to.

The correctness of every charge must depend upon the phraseology used by the court; and, of course, but little aid, from adjudicated cases, can be expected in a case like the present.

¹ In *Amy v. The Supervisors*, 11 Wall. 188, the court say, "the rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages, to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty, and honest

intentions, will not excuse the offender." *s. p. Boyden v. Burke*, 14 How. 575. A public officer, sued for an illegal act, cannot justify under the instructions of the head of an executive department. *United States v. Kendall*, 5 Cr. C. C. 168; *a. c. 12 Pet. 524; Lennig v. Maxwell*, 8 Bl. C. C. 126; *Munsell v. Maxwell*, Id. 364.

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*The collector, in point of law, had no right to demand a bond for more than the duties at the rate of fifteen per cent. *ad valorem*; and the plaintiffs were under no obligation to give bond in a greater sum; and the fact of having failed to give such illegal bond was not a circumstance which should have lessened the plaintiffs' damages nor, in point of law, should the good faith in which the defendant seems to have acted, exempt him from compensatory damages.

In the argument of the case, the counsel for the defendant objected to the proceeding by writ of error, alleging that, as the jury had found for the plaintiffs in the circuit court, the proper course would have been, to move the court for a new trial, on the ground of the insufficiency of the damages; and that error would not lie, as this was no more than an application to the court for a new trial, on that ground. The objection that the proper remedy of the plaintiffs was by a motion for a new trial, and that the question now made on this writ of error is substantially a motion for a new trial, seems not to be well founded; the amount of damages found by the jury, is only referred to, as showing that they considered their verdict as controlled by the direction of the court.

Some personal inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government, in such cases, is bound to indemnify the officer, there can be no eventual hardship.

ERROR to the Circuit court for the Southern District of New York. This action was commenced by the plaintiffs in error, in the superior court of the city of New York, and on the suggestion of the defendant, that the suit was instituted against him for acts done by him under the revenue laws, as collector for the district of the city of New York, and praying that the same should be removed to the circuit court of the United States for the southern district of New York, the cause was so removed to October term 1833.

The declaration was in trover for certain casks of syrup of sugar-cane. Special counts were added, setting forth that the plaintiffs had imported certain casks of syrup of sugar-cane, on which the duty was fifteen per cent. *ad valorem*; that the plaintiffs were ready and willing, and offered to enter the goods at the legal rate of duty, and to give bonds accordingly, and to do every act necessary to make such entry. Nevertheless, the defendant, although he declared himself satisfied with the sufficiency of the offer or tender of the plaintiffs, except as to the amount of duties, for which he required bonds in a much larger amount, over three cents per pound, for every pound of said syrup; and, although defendant then waived [*82] any further tender, nevertheless, he refused to allow plaintiffs to enter and secure the duties on the syrup, at the rate required by law, and refused to deliver the syrup for a long time, over eighteen months, when it was delivered, upon payment of the duties, at fifteen per cent. *ad valorem*; whereby plaintiffs were damaged by the deterioration of the property, &c., stating the damage specially. The defendant pleaded the general issue.

On the trial, it was proved, that the goods were consigned by plaintiffs to one F. A. Tracy, of New York, to sell for plaintiffs. That F. A. Tracy, by his attorney, J. S. Carpenter, the witness, offered to enter the goods, shortly after the arrival, at fifteen per cent. *ad valorem*. The collector said, he had instructions from the department, not to permit the entry at less than three cents per pound. The witness added, "he said he would permit the entry at fifteen per cent. *ad valorem*, but should require bonds at three cents per pound." Some time after this, Balestier, one of the plaintiffs, arrived in this country, and he went to the collector, in company with the witness, E. A. Weeks, and then delivered him the letter set out in the bill

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of exceptions, making an offer of bonds at fifteen per cent. *ad valorem*, inquiring whether a formal tender of a bond or bonds as aforesaid was required. He exhibited the bills of lading, invoices, &c. The collector said "he could not act, he could not permit him to enter the goods, upon the terms and at the rate of duty mentioned in the letter, because it was contrary to instructions from the department." "The collector did not refuse an entry to be made, but insisted, that the goods should pay a higher rate of duty." It appeared, that the duties demanded were equal, if not greater than the value of the goods; the consignee would not bond them, and plaintiffs offered to prove that they were unable to furnish bonds at the rate demanded by the collector. The goods were put in a public store, and remained there a long time; they were finally delivered to the plaintiffs on their bonds, at the rate of fifteen per cent. *ad valorem*. "The department" having in the meantime changed its views of the law of July 14th, 1832, § 17. *After the foregoing evidence had been given, the plaintiffs [§ 83] produced several witnesses, to prove that the syrup was worth from eight to ten cents per gallon less, when given up by the collector, than when the bonds were offered, in consequence of necessarily growing acid by standing.

The court charged the jury, "admitting the merchandise in question to be subject to a duty of only fifteen per cent. *ad valorem*, yet the circumstances under which the dispute about the rate of duty arose, ought not to subject the collector to the payment of more than nominal damages; that the collector was pursuing what he believed to be his duty, and whatever injury the plaintiffs sustained, in not receiving their goods at an earlier day, grew out of their own conduct, in not entering the goods in the manner offered by the collector, at fifteen per cent. *ad valorem*, taking the bond, however, to secure the payment of three cents per pound; merely placing the case in a situation to have the question judicially decided as to the rate of duty; no intimation being given, that it would occasion any inconvenience to the plaintiffs, to give the bond so required by the collector." To this charge, the plaintiffs' counsel excepted; and the jury found for plaintiffs, six cents. The plaintiffs prosecuted this writ of error.

The case was submitted to the court on printed arguments, by *Sedgwick*, for the plaintiffs in error; and by *Price*, district-attorney of the United States for the southern district of New York, for the defendant.

Sedgwick, for the plaintiff, presented two points for the consideration of the court: 1st. The plaintiffs had a good cause of action against the collector for damages actually sustained. 2d. The judge erred in charging the jury as to the rights of the plaintiffs.

I. As to the first point, it was argued, that the doubts which previously prevailed as to the responsibility of the collector for wrong done, in such a case as the present, no longer existed. The great principle is stated by Chief Justice SPENCER, in *Bartlett v. Crozier* (15 Johns. 254), "whenever an individual has sustained an injury by the misfeasance or nonfeasance of an officer, who acts or omits to act, contrary to his duty, the law affords redress." Cited also, 8 Wentworth 462; *Olney v. Arnold*, 8 Dall. 308. In *Conard v. Pacific Ins. Company*, 6 Pet. 281, the precise doctrine contended for is laid down by the court, that the possession of the

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collector is a mixed possession, for the benefit of the owner and the government, and "that when the duties are paid or tendered, if the collector retains the goods, it is a tortious conversion."

There is nothing in this case which should protect the collector from the operation of this rule. The judge seems to suppose, that the plaintiffs unnecessarily involved themselves in the situation in which they were placed; that they might have given bonds for the duties as claimed. But if this were so, still they had a right to refuse giving bonds for more than the actual duties; and they had, on tendering such bonds, a full right to the goods; and the detention of them by the collector, afterwards, made him responsible. But the facts of the case do not authorize any charge against the plaintiffs. An offer was made of the actual duties; and it was, in the opinion of the attorney of the consignee, doubtful, whether the goods would have sold for the duties claimed. Evidence was offered to prove the inability of the plaintiffs to procure bonds for the amount of the claimed duties, but this was not permitted. The communication of this would not have induced the collector to change his course.

It is said, the loss of the plaintiffs arose from not having entered the goods, in the manner offered by the collector, at fifteen per cent. *ad valorem*; and giving bonds at the higher duty. But the offer is denied, and if it had been made, it would not diminish the plaintiffs' claim in this case. But the offer was to allow an entry at fifteen per cent., when bonds for three cents per pound were insisted upon; and this is the grievance; for the goods could not be obtained, until these bonds were afterwards given. But suppose, a party, under such circumstances, could give a bond; how is it possible, that a man could be bound in law to give a bond which the law says he ought not to pay? If lawyers can surmount this paradox, merchants would be very apt to find, in the uncertainty of all legal disputes, a substantial reason against *signing a bond, and trusting to law for [*85 avoiding it afterwards. It has been shown, that the plaintiffs had a clear cause of action to recover their actual damages; which, in point of fact, amounted to a large sum of money.

II. The next inquiry is, whether his honor the judge misdirected the jury. It is submitted to the recollection of the judge who tried this cause, that after he expressed an opinion, that the case of the plaintiffs was one of *damnum absque injuria*, as the bonds might have been given, an offer was made to prove inability; which was rejected by the court, no notice of this having been given to the collector. The jury were, therefore, not addressed by the counsel on the question of damages.

The court will, however, look only at the bill of exceptions. The inquiry is, whether the exception here is as to matter of law or matter of fact. Exceptions are doubtless confined to matters of law, and extend "to every case in which the judge, in his directions or decisions, misstates the law." (3 Bl. Com. 372.) The question on this point ought to be decided with reference to the impression which the charge was calculated to make upon the jury; and if they gave their verdict in compliance with what they had reason to suppose the judge charged the law to be, and in consequence of that charge, the verdict ought to set aside. The judge charged the jury, that the circumstances under which the dispute about the rate of duty

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arose, ought not to subject the collector to the payment of more than nominal damages.

It might be supposed, that the judge, by admitting the case to be one of nominal damages, plainly intimated that the law was with the plaintiffs. But it is submitted, that the idea which the jury must have received, was that the right of the case, in point of law, was with the defendant. They always regard a verdict of six cents as mere matter of form; and so it is, in point of fact, unless it be a case taken out of the general rule as to costs, by a special provision of the statute. The judge declared, that the plaintiffs ought not to recover, under the circumstances of the case. The jury must have understood that it was their duty to render a verdict for nominal damages. They most assuredly *did, in point of fact, render [86] their verdict, because they considered themselves bound to do so by the charge of the judge.

His honor the judge proceeded to state the principal circumstances on which his opinion rested, and the first was, that the collector was pursuing what he believed to be his duty. This was a good reason why we should not recover smart-money, or anything beyond our actual damages; but the jury must have supposed, that this circumstance, taken in connection with the fact, that if bonds had been given for the amount claimed by the collector, the obligors might have defended themselves against the suit on those bonds, constituted a good defence in this suit against the recovery of anything but nominal damages. But these circumstances, especially that relating to the *quo animo* of the collector, were such as would naturally give rise to a question of law, which very naturally and necessarily presents itself; viz., does the law in such a case allow a recovery against an innocent collector? The jury must have seen, that this was a question of law; and when the judge said the plaintiffs ought not to recover, it was equivalent to saying that they ought not, in judgment of law, to recover.

If we consider the proper province of the court and jury, respectively, in this case, the error of the charge will be apparent. The questions for the court were, 1st, whether the *bona fides* of the collector was a defence; 2d. Whether the right of an obligor on such bonds to contest the duties, makes it the duty of the party to give the bond; or in case of his omission, deprives him of his action? 3d. The rule of damages, viz., whether we were to recover for any difference in the market, at the respective periods of the offer to bond, and the delivery of the property; or only for the deterioration and necessary leakage. The question for the jury was, what was the amount of damages, according to the rule which the court should lay down. In consequence of the opinion of the judge, expressed to the counsel, they did not sum up. The court told the jury, they ought to find nominal damages; in short, that was their rule of damages, and of course they had nothing to inquire about; and so they understood it, for they rendered their verdict immediately. It appears to follow, that the charge [87] of the judge was, in point *of fact, what the jury understood it to be, a charge as to the law; and not as it is now interpreted, an opinion upon the facts of the case. But whether it was so in fact, or was so understood by the jury, to be a charge on the law; in either case, the verdict and judgment must be set aside.

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Price, for the defendant, contended, that the only question in the case, as it is presented by the bill of exceptions, is the relevancy of certain evidence. The plaintiffs had not made a case in the declaration to which the evidence would apply ; and it was, therefore, impertinent, and was properly rejected. It is, however, agreed, that the charge of the court shall be open to examination.

After an examination of the pleadings, with a view to show that the charge of the court was entirely correct on the question raised by them, as well on the facts of the case ; he argued, that the judgment in favor of the plaintiffs ought not to be reversed. 1. The plaintiffs had already a verdict in their favor ; and it is not competent for them, upon a writ of error, to disturb a verdict in which the defendant acquiesces. 2. The evidence offered by the plaintiffs was properly overruled by the court ; and properly rejected. 3. The charge of the circuit court was in every respect correct. 4. If the cause should be remanded for another trial, there is nothing apparent on the record, which would place the plaintiffs in a more favorable position than they held on the first trial.

1. On the first point, that as the plaintiffs have had a verdict in their favor, it is not competent to them to prosecute a writ of error ; it was argued, that this is essentially an application for a new trial. Having already obtained a verdict, no question on the amount of the verdict can be raised on a writ of error ; that was exclusively a question for the court below. If the damages assessed by the jury were insufficient, an application should have been made for a new trial. The refusal of the court to grant this, is not the subject of a writ of error (6 Cranch 11, 187 ; 4 Wheat. *213) ; and in the circuit court, a new trial was moved for and refused. Will this court correct the error of the circuit court in refusing a [*88 new trial ? An appellate court will render such a judgment as ought to have been rendered by the inferior court. If the circuit court would not allow the plaintiffs to speculate on the chance of heavier damages, this court will not do it. A new trial is never granted for inadequate damages, but under special circumstances ; and this less will this court do what will be entirely equivalent to a new trial, by awarding a *venire de novo*. Cited on this point, *Graham on New Trials* 411, 450 ; *Hayward v. Newton*, 2 Str. 940 ; *Barker v. Dixie*, Ibid. 1051 ; *Beardmore v. Carrington*, 2 Wils. 244.

The jury, in assessing the damages, must have taken into consideration the amount of the injury which the plaintiffs had sustained, by reason of the illegal conduct of the defendant. The counsel for the plaintiff admitted, on the trial, that the defendant acted in good faith, and under instructions from the treasury department. It was, therefore, a case in which the jury were limited to damages actually sustained, fully proved to them ; and they could not give damages as a penalty.

2. The evidence offered by the plaintiffs was properly overruled. No notice of the difficulty or inconvenience to the plaintiffs, in entering into the bonds, was given to the collector. Such evidence could only be admitted under a special count, if admitted at all. A party is not to be brought into court to answer to matters of which he is not apprised ; of which he has not had notice, that it was incumbent upon him to inform himself.

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3 and 4. The charge of the court was correct ; and if the cause shall be remanded, there is nothing in the record which will place the plaintiff in a better position than one on the former trial. Upon these points, the counsel for the defendants urged, that, on a new trial, no other result than that which had occurred could be expected. If the evidence offered was properly refused, there would be an end of the question between the parties, and the verdict would stand. If it was to be admitted, as the charge of the court was correct, no other result would follow. The liability of the goods for duties is not denied ; the rate of *the duties payable was *89] the only question ; and had the plaintiffs accepted the proposal of the collector to give bonds for the duty claimed, protesting against the amount of the claim, no injury would have been suffered. They would have had possession of their goods ; and as the claim for the higher duties was afterwards abandoned, no loss would have arisen.

The plaintiffs cannot, under any circumstances, sustain a recovery in this action. They have not shown, in themselves, possession or property in the goods. The collector was lawfully in possession under the laws of the United States ; and he had a right to retain possession, until he was relieved of the custody by the party claiming the same, and having conformed to the law. He did no act, while in possession, which would render him liable as a trespasser. His possession was that of a bailee ; and a bailee is never responsible for the natural and inevitable deterioration of the subject bailed. But he was not even a bailee, but the servant of the government, bound to execute legal orders. Acting in good faith, and under orders, how can he be liable personally ? That question is easily answered. 1st. He had the possession lawfully, in the first instance ; we say, merely as the servant of the government. 2d. He has done no intermediate act, which could retrospectively vary the character of his possession. The doctrine of trespass *ab initio* is a doctrine arising out of equitable principles ; and was intended to give a party advantages which he could not have, under the strict technical rules of pleading. It was intended to permit a party, under the general form of a declaration in trespass, to give evidence of matters which it would be difficult or hazardous to plead specially. Thus far, it is a substitute for a special action on the case. But let it be remembered, that it is not pretended, that the plaintiffs, in this instance, should have brought their action in trespass ; on the contrary, it is admitted, that the action on the case is their only remedy : but there is the further consideration, that in an action of trespass, the lawful possession of the defendant is a pre-requisite, before he can be made a trespasser *ab initio*. It must be the possession of the principal, and not the possession of the servant.

*If a man directs his servant to take my goods, and the servant *90] seizes them, it is clear, that they are both trespassers; but if goods are delivered to a man to keep, and he destroys these goods, he may be a trespasser by relation ; but, if the act was committed by his servant, without his order or authority, it is the direct trespass of the servant, who alone is liable. If goods are delivered to the master to keep, and they are kept so negligently that the goods are lost, the master is responsible, in some form of action, for his negligence. If the master intrusted the custody of

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the goods to the servant, and they were lost through the negligence of the servant, the master must be called on for redress. The collector is a mere servant or clerk, and cannot be rendered liable to a third person, for any negligence or omission for which any other servant or clerk would not be responsible. The act organizing the treasury department, September 2d, 1789, would seem to put this question out of all doubt. It is there made the duty of the secretary of the treasury, "to superintend the collection of the revenue;" thus, in the broadest terms, subjecting every person connected with the collection of the revenue, to the supervision and control of the head of the treasury department. And here, let it be recollected, that the collector was, in this instance, acting under the instructions of the treasury department.

If anything further were wanting to show the merely subordinate character of the collector, it is made manifest, from the circumstance, that it was found necessary expressly to authorize by law the collector to act through a deputy (Act to regulate the collection of duties, &c., March 2d, 1799, § 22, 1 U. S. Stat. 644), and by a subsequent law (Act of March 3d, 1817, § 7), a collector can only appoint deputies, with the approbation of the secretary of the treasury. The collector cannot appoint inspectors of the customs, without the approbation of the treasury department (Act further to provide for the collection of duties, &c., March 3d, 1815, § 3), and "the number and compensation of clerks to be employed" in his office, may be limited and paid by the secretary of the treasury. (Act of March 7th, 1822, further to establish the compensation of officers of the customs, &c. § 15.) *Hence, the law does not regard him as the agent of the government, but as a mere subaltern, or servant, of the secretary of [*91 the treasury; who is the proper and immediate agent of the law "to superintend the collection of the revenue."

In reply to some points of the opening argument of the plaintiff's counsel, it was submitted to the court, that the decision in *Bartlett v. Crozier*, 15 Johns. 254, was reversed; and the opinion of Chancellor KENT was adopted by the court of error, of New York. 17 Ibid. 439. The authority in *8 Wentworth's Pleading*, 462, is directly in conflict with the case of the plaintiff in error. The declaration in that case was against the collector, for maliciously intending to injure the plaintiff by preventing his exporting certain goods, &c. The counsel also referred to *Olney v. Arnold*, 3 Dall. 308; which does not meet the present case. It is not intended, but that cases may occur in which an action may be sustained against a collector; but the case of *Olney v. Arnold* decides no principle whatsoever.

It is asked, if the plaintiff was bound to give bonds which the law did not authorize, and then set up a defence to a suit on these bonds. It would be difficult to establish that the law did not authorize the taking of the bonds. The condition of the bond to be given, under the 65th section, is always to pay a sum certain, on the amount of the duties to be ascertained as due and arising on certain goods, &c. This shows the authority of the collector to take the bond. The law says, that to obtain goods imported, the duties must be paid in cash, or a bond given; and until a judgment is passed on the bond, all errors in the liquidation of the duties may be corrected. 1 U. S. Stat. 677, § 66; *Ex parte Davenport*, 6 Pet. 661.

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Sedgwick, in reply to the position that the plaintiffs cannot disturb a verdict in their favor, in which the defendant acquiesces, stated: If by this, it be meant to say, as in the authorities referred to, that the refusal of a new trial because against evidence, is not ground for error, that is not denied.

If it be meant to say, that if the judge charges contrary to law, and *92] *plaintiff recovers six cents, when, if a right charge had been given, he might and probably would have recovered \$3000, and an exception be taken, that error cannot be brought, the proposition is too manifestly erroneous to require refutation.

It was stated in the argument in chief, that it was a paradox to say, "the plaintiffs were bound to give a bond which the law did not authorize." This has been answered, by saying, that the collector was authorized to take the bond, because the condition in it is to pay duties to be ascertained, &c. This case strongly exemplifies the unsoundness of the argument. The duties at fifteen per cent. *ad valorem* amounted to less than one-sixth part of the duties at three cents per pound. The proposition of the defendant's counsel is, that as the collector has a right to require a bond for the duties to be ascertained, it is what he may estimate the duties to be. In other words, that it is the same thing for the collector in this case to demand a bond at three cents per pound, or at fifteen per cent. *ad valorem*. If this be so, then it would make no difference, if the collector demanded a bond for duties one hundred times greater than the real duties, supposing him to act innocently and by order of the department. If the proposition laid down by the defendant's counsel be sound, why would not the collector be equally justified in cases of malice? It might be said, the malice could do no harm, because the bond is only for such duties as may be ascertained. The mischief is precisely the same in both cases.

But to take the present case. The claim of the collector is matter of substance, and not of form. It may be ruinous. It is the duty of the collector to indorse the estimated amount upon the entry. He then requires a sufficient surety; and a bond in a penal sum sufficient to cover the estimated duties, and generally, twice their amount. The surety, before signing the bond, of course, examines the entry, to see what he may be called upon to pay. Finding that the claim against him will be for the duties according to the principle assumed by the collector, he must decide beforehand to pay them or to contest the bond. If he pays them, he must take his chance of recovering them back. The defendant's counsel will not pretend, he should *93] be subjected to this, for *he says, that in that case, he could not recover them back. But he must defend the bond. He cannot do this, without the inconvenience of being denied a credit at the custom-house, during the controversy; which may last till all his credit is gone.

But it is not necessary to go thus far. The owner has this unanswerable objection, that he ought not to be required to give a bond in an unreasonable penalty; such a bond, indeed, as he may not be able to give. The collector has a right to actual and valid security for the estimated duties, and to make it sure for the amount named in the penalty of the bond. He has a right to require sureties, amply able to pay that amount; and that is all. Now, suppose, the duties to be in fact \$500, he may ask security in \$1000. Suppose, instead of this, he estimates the duties, without any fault

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in the importer, and from a wrong assumption as to the rate of duties, at \$5000 ; and demands security in \$10,000.

MCLEAN, Justice, delivered the opinion of the court.—This case was brought into this court by a writ of error to the circuit court for the southern district of New York. The suit was prosecuted in that court, to recover damages from the defendant, who, as collector of the customs, had refused to allow the plaintiffs to enter and receive the payment of the lawful duties, on certain casks of syrup of sugar-cane ; which they had imported into the port of New York. It is admitted, that the law imposed no more duty on the article than fifteen per cent. *ad valorem*; although the collector, acting under the instructions of the secretary of the treasury, required bond for the payment of the above duty, or, should it be required, a duty of three cents per pound. No bond was given, and the syrup remained in the possession of the collector for a long time; by which means its value was greatly deteriorated. The question for consideration arises out of a bill of exceptions, in which the evidence is stated at large ; showing the quality of the syrup, the number of gallons imported, and the refusal of the defendant to take bond for the fifteen per cent. *ad valorem* duty.

It was admitted by the counsel of the plaintiffs, that the *defendant acted throughout with entire good faith ; and under instructions from the treasury department. The plaintiffs' counsel offered to prove that they were unable to give bonds for duties at three cents per pound ; though they did not state that fact to the defendant, at the time they offered to make the entry. The court overruled this testimony, and instructed the jury "that, admitting the merchandise in question was only subject to an *ad valorem* duty of fifteen per cent., yet the circumstances under which the dispute about the rate of duties arose, ought not to subject the collector to the payment of more than nominal damages ; that the collector was pursuing what he believed to be the true construction of the law ; and whatever injury the plaintiffs may have sustained, in not receiving their goods at an earlier day, grew out of their own conduct in not entering the goods in the manner offered by the collector, at fifteen per cent. *ad valorem*, taking the bond, however, to receive the payment of three cents per pound, if such should be the legal rate of duties demandable ; merely placing the case in a situation to have the question judicially decided, as to the rate of duty, no intimation, at the time, being given, that it would occasion any inconvenience to the plaintiffs to give the bond so required by the collector." Under this instruction, the jury found a verdict for six cents damages and six cents costs.

There can be no doubt, that the circuit court decided correctly, in overruling the evidence of inability in the plaintiffs to give the bond demanded by the defendant. The materiality of this evidence is not perceived ; and if it had been material, it ought not to have been received ; unless the fact of inability had been made known to the defendant, at the time the bond was required.

In the argument, objections were made by the defendant's counsel, to the sufficiency of the counts in the declaration ; but these do not necessarily come before us in the present posture of the case ; and should the judgment of the circuit court be reversed, and the cause remanded for further pro-

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ceedings ; if the pleadings be deemed defective, the parties, with the leave of the circuit court, may amend them.

The collector of the customs is a ministerial officer ; he acts *under [95] the instructions of the secretary of the treasury, who is expressly authorized to give instructions, as to the due enforcement of the revenue laws." Do these instructions, when not given in accordance with the law, afford a justification to the collector, or exonerate him from the payment of adequate damages for an injury resulting from his illegal acts ? The circuit court, in their charge to the jury, did not consider these instructions as a justification to the defendant ; and in this they were unquestionably correct. The secretary of the treasury is bound by the law ; and although, in the exercise of his discretion, he may adopt necessary forms and modes of giving effect to the law : yet, neither he nor those who act under him, can dispense with, or alter, any of its provisions. It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress. The facts of the case under consideration, will forcibly illustrate this principle. The importers offer to comply with the law, by giving bond for the lawful rate of duties ; but the collector demands a bond in a greater amount than the full value of the cargo. The bond is not given, and the property is lost, or its value greatly reduced, in the hands of the defendant. Where a ministerial officer acts in good faith, for an injury done, he is not liable to exemplary damages ; but he can claim no further exemption, where his acts are clearly against law. The collector has a right to hold possession of imported goods, until the duties are paid or secured to be paid, as the law requires. But, if he shall retain possession of the goods, and refuse to deliver them, after the duties shall be paid, or bond given or tendered, for the proper rate of duties, he is liable for the damages which may be sustained by this refusal.

On the part of the defendant, it is insisted, that the charge of the circuit court was on the facts of the case, and was limited to an expression of opinion on those facts, without any direction as to any matter of law. A [96] court may not only present the facts proved, in their charge *to the jury ; but give their opinion as to those facts, for the consideration of the jury. But as the jurors are the triers of facts, such an expression of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments. They should be made distinctly to understand, that instruction was not given as a point of law, by which they were to be governed ; but as a mere opinion as to the facts, and to which they should give no more weight than it was entitled to. And if a fair construction of the charge complained of, shall amount to no more than this, it is liable to no valid objection.

The correctness of every charge must depend upon the phraseology used by the court ; and of course, but little aid, from adjudicated cases, can be expected in a case like the present. In 3 Burr. 1742, a charge of Lord CAMDEN, when chief justice of the C. B., is given, as follows ; "And the said chief justice did then and there declare and deliver his opinion to the jury, that the said several matters so produced and proved, on the part of the defendants, were not, upon the whole case, sufficient to bar the action, and with that opinion left the same to the jury." This instruction, in the lan-

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guage of Chancellor KENT, 12 Johns. 518, has always been "taken and received as a direction in a point of law."

In the instruction under consideration, the court say to the jury, that, "admitting the merchandise in question was only subject to an *ad valorem* duty of fifteen per cent., yet the circumstances under which the dispute about the rate of duties arose, ought not to subject the collector to the payment of more than nominal damages." "That the collector was pursuing what he believed to be the true construction of the law, and whatever injury the plaintiffs may have sustained, in not receiving their goods at an earlier day, grew out of their own conduct, in not entering the goods in the manner offered by the collector, at fifteen per cent. *ad valorem*, taking the bond, however, to secure the payment of three cents per pound," &c. This language seems to be susceptible of but one construction, and that is, that as the plaintiffs refused to give the bond required by the collector, who acted in good faith, they ought to recover no more *than nominal damages. That the jury considered this direction as controlling their verdict, is [*97] clearly shown by the damages which they assessed. And, indeed, it is not perceived, how they could have given any other effect to the charge. It covered the whole case, and must have been received by the jury as a direction on the law of the case. In what other light could they have considered it? The court did not say, that exemplary damages ought not to be given; but that, under the facts and circumstances of the case, no more than nominal damages should be assessed. The facts of the case were clearly established, and, indeed, were not controverted; and the amount of damages was the only matter for the investigation of the jury. On this point, the jury should have exercised their own discretion, aided, if necessary, by the opinion of the court in relation to matters of fact; and controlled by their direction, in matters of law. But the jury were told, as the effect of the whole evidence, that they ought to give nominal damages only.

The collector, in point of law, had no right to demand a bond for more than the duties at the rate of fifteen per cent. *ad valorem*; and the plaintiffs were under no obligation to give bond in a greater sum. And the fact of having failed to give such illegal bond, was not a circumstance which should have lessened the plaintiffs' damages; nor, in point of law, should the good faith in which the defendant seems to have acted, exempt him from compensatory damages. In the case of *Greenleaf v. Birth*, 9 Pet. 299, the counsel prayed the court to instruct the jury, that "the evidence was not sufficient to prove that the said contract between Nicholson and Greenleaf, on the one part, and W. Stewart, on the other, had been annulled or rescinded between the parties, at any time prior to the execution of the deed by the plaintiff to Morris and Nicholson, in May 1796." And this court say, "if this instruction be considered as asking the court to determine on the effect of the evidence, it was properly refused. It is the province of the jury to weigh and decide on the sufficiency of the evidence; and from the words of the instruction, it would seem to be conceded, there was some *evidence of the rescission of the contract, as the court were [*98] asked to instruct the jury that the evidence was not sufficient to prove the fact. Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right

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of weighing the evidence, and determining what effect it shall have. In this view, the circuit court did not err in refusing the above instruction." And again, in the case of the *Chesapeake and Ohio Canal Company v. Knapp and others*, 9 Pet. 567, this court say, "but it is insisted, that in their instruction, the court lay down certain facts as proved, which should have been left to the jury. If this objection shall be sustained, by giving a fair construction to the language of the court, the judgment must be reversed; for the facts should be left with the jury, whose peculiar province it is to weigh the evidence, and say what effect it shall have."

In some cases, it may be difficult to determine, whether an instruction was given on the facts or the law of a case; but where the jury are instructed what their verdict should be, it is a direction on the effect they should give to the evidence, and they cannot fail to consider the construction as the law applicable to the facts. This must have been the light in which the jury viewed the charge under consideration; and we think it is the true construction of the language used by the court. In their address to the jury, the circuit court may have qualified, by words not reported, the sentences contained in the bill of exceptions; but the legal question arises, and must be decided from the face of the bill.

The objection that the proper remedy for the plaintiffs was by a motion for a new trial, and that the question now made on this writ of error, is substantially a motion for a new trial, seems not to be well founded. The amount of damages found by the jury is only referred to, as showing that they considered their verdict as controlled by the direction of the court. And this court consider that direction erroneous in point of law.

[*99] Some personal inconvenience may be experienced by an *officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship. The judgment of the circuit court must be reversed, and the cause remanded to that court, for further proceedings.

Judgment reversed.

*100]

*ANTONIE SOULARD'S Heirs v. UNITED STATES.

Land-claims in Missouri.

A concession and survey of land in Missouri, which was granted by the lieutenant-governor of Upper Louisiana, before the treaty of Louisiana, confirmed, so far as the land embraced in the same has not been sold by the United States. For the quantity of land so sold, the owners of the concession may enter a like quantity in any land-office in Missouri, after the same has been offered for sale.

APPEAL from the District Court of Missouri. A petition was filed, on the 22d day of August 1824, by Antoine Soulard, in the district court of the United States for the district of Missouri, for the confirmation of a tract of land, under the authority of the act of congress, passed May 26th, 1824, entitled an act enabling the claimants of lands within the limits of the state of Missouri and territory of Arkansas, to institute proceedings to try the validity of their claims; and stating, that on the 26th of April 1796, the lieutenant-governor of Upper Louisiana, Don Zenon Trudeau, granted to

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him, in consideration of services rendered by the petitioner to the Spanish government, 10,000 arpents of land, he being then a resident of the province, to be located on any vacant lands belonging to the royal domain. In pursuance of which decree of concession and survey, the land was located and surveyed on the river Cuivre, about seventy miles north of St. Louis, and about fifteen miles west of the river Mississippi. The petition stated that no more than 2067⁸⁸/₁₀₀ acres were occupied under adverse title, and prayed, that the title to all the land which had not been sold by the United States, should be confirmed, and that he should be allowed to locate the residue of the grant, on other unsold lands belonging to the United States.

On the 27th of March 1825, Julie Soulard, the widow, and James G., Henry G., Eliza G. and Benjamin Soulard, the children and heirs of Antoine Soulard, he having died intestate, were, on filing a petition in the district court, made parties to the *cause. After various proceedings in the [*101 district court, the following decree was made.

The cause coming on to be debated and heard, in the presence of the counsel for the petitioners and of the attorney for the United States for the district of Missouri, on the petition, the answer and the testimony which is embodied in the record, it appears, that the petition sets forth, in substance, that some time in the month of April 1796, Antoine Soulard, the ancestor of the present petitioners, being then a resident of the province of Upper Louisiana, and surveyor-general of the same, under the Spanish government, presented his petition to the then lieutenant-governor of said province, Don Zenon Trudeau, praying a grant of a tract of 10,000 arpents of land, to be located on any vacant part of the royal domain. That in compliance with the said petition, and in order to remunerate the services of said petitioner, the said Don Zenon Trudeau, lieutenant-governor, did, about the time aforesaid, grant to the said petitioner 10,000 arpents of land, and by said decree of concession, did order the said quantity to be located and surveyed on any part of the royal domain in said province, at the election of said petitioner. That the said quantity of land was, afterwards, on the 20th day of February 1804, surveyed and located by the deputy-surveyor, Don Santiago Rankin, on a vacant part of the public land, situate about fifteen miles west of the Mississippi river, and seventy miles north of the town of St. Louis, on a branch of the river Cuivre, and bounded as follows: commencing at a point in the north-east quarter of section 25, township 51 north, range 3 west; runs thence north 68° east, 317 chains 8 links, to a point in the north-east quarter of section 14, township 51 north, range 2 west; thence, north 22° west, 214 chains and 18 links, to a point in the south-east quarter of section 34, township 52 north, range 2 west; thence, south 68° west, 317 chains and 8 links, to a point in the south-east quarter of section 11, township 51 north, range 3 west; thence, south 22° east, 214 chains, 16 *links, to the place [*102 of beginning. And that a certificate of said survey was duly made and recorded in the book of record of surveys, kept by the said petitioner, as surveyor as aforesaid. That before the time when claims should have been filed, pursuant to the act of congress of the 2d March 1805, the said decree of concession and certificate of survey were, by mistake, thrown into the fire and destroyed. That in consequence of the destruction of said concession and certificate of survey, the said petitioner considered that he was excluded from the benefit of the act of congress passed for the relief of land-

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claimants, and omitted to file any notice of his claim, and has, thereby, been deprived of the benefit of the laws heretofore passed by congress. That of the said tract of land, 1947¹⁵/₁₆ acres, have been sold by the United States, and that the residue of the said tract is not claimed or possessed by any person other than the petitioner. And that the same has been reserved from public sale, until the final adjudication thereon by the proper tribunal. The petitioner prays that the validity of his said claim may be inquired into and decided, and that his claim and title may be confirmed to all that part of the said tract which has not been sold as aforesaid by the United States, and that he be authorized to enter, in any of the land-offices in the state of Missouri, the quantity of 1947¹⁵/₁₆ acres of land, the quantity sold as aforesaid by the United States. It appears also, that on the 17th day of March 1825, Julie Soulard, widow of the said petitioner, and James G. Soulard, Henry G. Soulard, Eliza Soulard and Benjamin A. Soulard, children and heirs-at-law of the said petitioner, filed their petition, setting forth that the said Antoine Soulard, after having filed and prosecuted his said petition, died, leaving the said widow and children his only heirs and legal representatives; and praying that the said cause might be revived and stand in their names against the United States; and the attorney of the United States freely admitting all the facts set forth in the petition of the said widow and children, the said cause was revived accordingly. *And it also appearing, that the answer of the attorney of the United States sets forth, in substance, that he is wholly uninformed of all the matters and things in the said petition of Antoine Soulard, revived as aforesaid, contained, and therefore, that he does not admit the same to be true, and that he prays the court that the said petitioners may be held and required to prove all such facts, matters and things, the existence whereof is, or may be deemed, necessary to the confirmation of the said claim. And moreover, that the said petitioners may be required and compelled to produce and show to the court, the law, usage or custom, by force and virtue whereof the said claim can or ought to be confirmed. And it further appearing, by the finding of the jury empanelled to try the issue directed in this cause, that such concession was made to the said Antoine Soulard, as in the said petition is stated. And it also appearing in evidence offered on the part of the said petitioners, that a survey of the said land was made, and a plat thereof recorded, as in the said petition is stated. And that it was the practice of the lieutenant-governors of Upper Louisiana to make concessions of land, in virtue of their office, as such governors, and not in virtue of any commission as sub-delegate. And after debate of the matters aforesaid, and the court having inquired into the validity of the title of the said petitioners; and for that it appears to the court, that no grant of the king's domain could have been legally made, unless made in virtue of some law or authority from him. And for that the regulations of Count O'Reilly, of the 18th of February, in the year 1770; and of Governor Gayoso, of the 9th of September 1797; and of Morales, the intendant, of the 17th of July 1799, exhibit a general intention and policy on the part of the Spanish government, in relation to the disposition of the public domain, which excludes every reasonable supposition of the existence of any law, usage or custom, under and in conformity to which, the alleged concession might have been perfected into a complete title, had not the sovereignty of the

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country been transferred to the United States, and for the principles, commands and prohibitions in those regulations contained, are not to be reconciled with any idea of the legality of the said concession, and are incompatible with the existence of any law, usage or custom, in conformity with which the said concession might have been confirmed, had no change of sovereignty taken place. The court doth, therefore, find the alleged concession and claim of the petitioners to be illegal in its origin, and invalid ; and doth, therefore, decide, adjudge and decree against the validity of the same ; and doth further order, adjudge and decree, that the said petitioners pay all costs and charges occasioned in and about the prosecution and defence of this suit. The petitioners entered an appeal to this court.

At January term 1830, the case was argued by *Benton*, for the appellant ; and by *Wirt*, Attorney-General, for the United States. The court held the case under advisement, as stated in the opinion reported in 4 Pet. 511.

The appeal was again argued at January term 1835, by *White*, for the appellants ; and by *Butler*, Attorney-General, for the United States ; and was held under advisement to this term, when—

BALDWIN, Justice, delivered the opinion of the court.—This is an appeal from the decree of the district court of Missouri, on the petition of the plaintiffs, praying for the confirmation of their claim to a tract of land, pursuant to the act of 1824, for the settlement of claims to land in that state. The petition was in due form, setting forth such a case as gave jurisdiction to the court below, who decided the claim to be invalid ; the appeal is regularly taken according to the terms of the law. It is in full proof, that on the 20th April 1796, the lieutenant-governor of Upper Louisiana, in consideration of the services rendered to the Spanish government by Antoine Soulard, the ancestor of the petitioners, made a concession or order of survey, to him and his heirs for ever, of a tract of land of 10,000 arpents, French measure, to be surveyed and located on any vacant land in the royal domain. Pursuant to this order, a survey was made, in February 1804, and recorded in the office of the surveyor-general of the district, in March following.

*To the confirmation of this title, various objections were made, on the ground that such concession was not authorized by the laws of Spain ; but as they have all been fully considered and overruled in the numerous cases which have been decided by this court, in claims to land in Florida, under the treaty with Spain, and in Missouri, under the treaty with France, and the various acts of congress on the subject, it is deemed unnecessary to notice them. To the survey, no objections have been made, if the concession is valid ; of which we can have no doubt, consistently with the principles heretofore established by this court.

We are, therefore, of opinion, that the claims of the petitioners to the land described in their petition is a good and valid title thereto by the law of nations, the laws, usages and customs of Spain (under whose government the title originated), the treaty between France and the United States for the cession of Louisiana, and the stipulations thereof, as well as the acts of congress in relation thereto; and that it ought to be confirmed to the petitioners, agreeable to the prayer of their petition.

Hook v. Linton.

The court doth, therefore, finally order, adjudge and decree, that the decree of the district court of Missouri be and the same is hereby annulled and reversed, except as to such part or parts of the land surveyed to the said Soulard, pursuant to the aforesaid concession, as had been sold by the United States, before the filing of the petitions in this case, as to which the decree of the district court is hereby affirmed, and the land so sold confirmed to the United States. And this court, proceeding to render such decree as the district court ought to have rendered, doth further order, adjudge and decree, that the title of the petitioners to all of said land embraced in said concession and survey, which has not been so sold by the United States, is valid by the laws and treaty aforesaid, and is hereby confirmed to them, agreeable to said concession and survey. And the court doth further order, adjudge and decree, that the surveyor of the public lands in the state of Missouri shall cause the land specified therein, and in this decree, to be surveyed at the expense of the petitioners, and to do such other acts thereon as are enjoined by law on such surveyor. Also, that such surveyor shall certify on the plats and certificates of such survey to be so made, what part or *106] parts of *the original survey of such land has been sold as aforesaid by the United States, together with the quantity thereof. Which being ascertained, the said petitioners, their heirs or legal representatives, shall have the right to enter the same quantity of land as shall be so certified to have been so sold by the United States, in any land-office in the state of Missouri, after the same shall have been offered for sale, which entry shall be made conformable to the act of congress in such case made and provided.

*107] *HARRIET E. HOOK and others, Appellants, v. JOHN LINTON, Curator.

Practice.

The death of the appellee having been suggested, and the counsel for his executor offering to enter his appearance for the executor, the court sustained a motion to dismiss the cause, as no person appeared to prosecute the suit for the appellants.

BILL in Equity from the District Court of Louisiana, brought by appeal to this court, from a decree of a district court dismissing the bill upon a demurrer.

It was suggested by *Porter*, as counsel for appellee, that Linton was dead, and he was ready to enter his appearance for his executor, and to revive the suit; and as no person appeared to prosecute the suit for the appellants, he moved for a dismissal of the appeal.

THE COURT took the motion into consideration, and on the succeeding day, directed the appeal to be dismissed.

*THE HOPE.

**SAMUEL B. HOBAET and others, Claimants of the BRIG HOPE and cargo,
Appellants, v. ANDREW DROGAN and others, Libellants.**

Salvage.

The brig Hope, with a valuable cargo, had been conducted, in the evening, by a pilot, inside of Mobile point, where pilots of the outer harbor usually leave vessels which they pilot inside of that bar; the pilot was discharged, and the Hope proceeded up the bay of Mobile; the wind soon after changed, blew a violent gale from the north-west, both anchors parted, and the Hope was driven on a shoal, outside of the point, among the east breakers; the gale increased to a hurricane, and forced the vessel on her beam-ends, and her masts and bowsprit were cut away; the master and crew deserted her, to save their lives. After various fruitless efforts to save her, the libellants, all pilots of the outer harbor of Mobile, two days after she was stranded, and while yet in great peril, succeeded; and she was brought up to the city of Mobile by them, towed by their pilot-boat, assisted by a steamboat employed by them. On a libel for salvage, the district court of the United States for the district of Alabama, allowed, as salvage, one-third of \$15,299.58, the appraised value of the brig and cargo; the owners of the brig and cargo appealed to this court.

The amount of salvage allowed by the district court is certainly not, under the circumstances of the case, unreasonable; this court is not in the habit of revising such decrees as to the amount of salvage, unless upon some clear and palpable mistake, or gross over-allowance of the court below; it is equally against sound policy and public convenience, to encourage appeals of this sort, in matters of discretion; unless there has been some violation of the just principles which ought to regulate the subject.

Suits for pilotage on the high seas, and on waters navigable from the sea, as far as the tide ebbs and flows, are within the admiralty and maritime jurisdiction of the United States. The service is strictly maritime, and falls within the principles already established by this court in the case of the Thomas Jefferson (10 Wheat. 428) and Peyroux *v.* Howard (6 Pet. 682).

The jurisdiction of the district courts of the United States, in cases of admiralty and maritime jurisdiction, is not ousted by the adoption of the state laws, by the act of congress; the only effect is, to leave the jurisdiction concurrent in the state courts; and, if the party should sue in the admiralty, to limit his recovery to the same precise sum, to which he would be entitled under the state laws, adopted by congress, if he should sue in the state courts.

A pilot, while acting within the strict line of his duty, however he may entitle himself to extraordinary pilotage compensation, for extraordinary services, as contradistinguishing from ordinary pilotage for ordinary services, cannot be entitled to claim salvage; in this respect, he is not distinguished from any other officer, public or private, acting within the appropriate sphere of his duty. But a pilot, as such, is not disabled, in virtue of his office, from becoming a salvor; on the contrary whenever he performs salvage services beyond the line of his appropriate duties, or under circumstances to which those duties do not justly attach, he stands in the same ^{relation to the property as any other salvor, that is, with a title} [*109] to compensation, to the extent of the merit of his services, viewed in the light of a liberal public policy.¹

¹ A pilot, while acting in the line of his strict duty, cannot entitle himself to salvage. The Wave, 2 Paine 181; a. c. 1 Bl. & H. 235; The Dido, 2 Paine 243; The Alexander, Id. 466; The Elvira, Gilp. 60; Love *v.* Hinckley, 1 Abb. U. S. 436. The court will not favor a claim for salvage, by a party originally engaged as a pilot; but at the same time, pilots are not to be compensated by mere pilotage remuneration for salvage services. The Jonge Andries, 1 Swabey 226, 308; a. c. 11 Moore P. C. 313. The exceptions to the general rule, that a pilot

cannot claim as salvor, ought to be few and well-defined, the services of a pilot cannot easily be converted into those of a salvor. A pilot entering into an engagement to pilot a vessel, undertakes to supply local knowledge, and the peculiar skill of his class, and will not be allowed, even though he contributes to the safety of the vessel, to change the character of his service from pilotage to salvage, except when the vessel was in distress, before he went on board to render the service, or where such circumstances of extreme danger and personal

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Seamen, in the ordinary course of things, in the performance of their duties, are not allowed to become salvors, whatever may have been the perils or hardships, or gallantry of their services, in saving the ship and cargo. Extraordinary events may occur, in which their connection with the ship may be dissolved *de facto*, or by operation of law; or they may exceed their proper duty; in which cases, they may be permitted to claim as salvors.¹

It is not within the scope of the positive duties of a pilot, to go to the rescue of a wrecked vessel, and employ himself in saving her or her cargo, when she was wholly unnavigable; that is a duty entirely distinct in its nature, and no more belonging to a pilot, than it would be to supply such a vessel with masts or sails, or to employ lighters to discharge her cargo, in order to float her. It is properly a salvage service, involving duties and responsibilities, for which his employment may peculiarly fit him; but yet in no sense included in the duty of navigating the ship.

This was a case where the libellants acted as salvors, and not as pilots; they had, at that time, no particular relation to the distressed ship; they proffered useful services as volunteers, without any pre-existing covenant, that connected them with the duty of employing themselves for her preservation; the duties they undertook were far beyond any belonging to pilots, and precisely those belonging to salvors.

APPEAL from the District Court for the Southern District of Alabama. The brig *Hope* was bound to Mobile from Havana, in January 1832, with a cargo of fruit, sugar, coffee, segars and tobacco. She arrived off the port of Mobile, on the 24th January 1832, took a pilot, and was carried safely within Mobile point, to a place at which the pilots are usually discharged; the pilot then left her, and she proceeded some distance up the bay, and came to an anchor, about six miles within Mobile point. In the night, the wind rose to a powerful gale; in the course of which the brig parted her cables, and was driven by the force of the winds and waves below Mobile point, where she grounded. The master and crew, in order to save their lives, took to the boat, and left the brig and cargo. The vessel remained grounded for some time, in great peril, having bilged and having four feet of water in her hold. The libellants, who were pilots of the outer harbor of Mobile, after having, without success, made previous efforts to board her, at length succeeded; and less than half an hour afterwards, the wind having changed, the vessel and cargo floated off; and the libellants took *110] her in charge. Had not the libellants been on board **the Hope*, at the time the wind changed, she would have been driven on the opposite shore, and would, with her cargo, in the opinion of the witnesses

exertion intervene, which exalt his service into a salvage service. The *Aeolus*, 4 L. R., Adm. 29. And see *The Richmond*, 4 Law Rep. 20; *The Susan*, 1 Sprague 499; *The Leathers*, Newb. 421; *The Grace Brown*, 2 Hughes 112; *The C. D. Bryant*, 16 Chicago Leg. News 227; *Akerblom v. Price*, 7 L. R., Q. B. 129.

¹ As a general rule, seamen can only be salvors, when their connection with the ship has been entirely broken up. *The Antelope*, 1 Lowell 180; *The Olive Branch*, Id. 286. Salvage service may be performed by the seamen, when an abandonment of her has put an end to their original contract. *The Vrede*, 30 L. J., Adm. 209. And see *Mesner v. Suffolk Bank*, 1 Law Rep. 249; *The Acorn*, 8 Ware 98; *The Alphonso*, 1 Curt. 876; *The Le Jonet*, 3 L. R.

Adm. 556. So, the rule is, that passengers rendering services, to a ship, when there is a common danger, are not entitled to salvage reward. *The Vrede*, *ut supra*. But where a ship being in danger, and the master and part of the crew having made their escape, a passenger, at the request of the rest of the crew, took the command, and brought the ship safe into port, he was allowed salvage. *Id.* So, a passenger, of the nautical profession, who has rendered extraordinary and peculiar services, in a moment of extreme peril, after the loss of the master and first and second officers, may claim compensation as a salvor. *Brady v. American Steamship Co.*, 10 Phila. 288; *The Great Eastern*, 11 Law Times (N. S.) 516.

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examined in the district court, have been totally lost. She was towed by the boats of the libellants into the port of Mobile.

The libellants proceeded for salvage against the *Hope* and cargo, and the district court awarded to them, as salvage, one-third of the value of the ship and cargo. The total value of the property saved was \$15,299.58. The owners appealed to this court.

The case was argued by *Ogden*, for the appellants; and by *Southard*, for the appellees. The facts of the case are stated more at large in the opinion of the court.

Ogden contended, that as the libellants were pilots of the outer bay of Mobile, they could not be considered as salvors; and could not claim salvage for such services as those which had been rendered to the *Hope*. The proceedings in the district court were for salvage, as appears by the bill; and the decree of that court, made on the 18th January 1833, is for one-third of the amount of the appraised value of the property saved, "as salvage." Having claimed as salvors, and the law not authorizing such a claim, they cannot now, by an amendment of the libel, state such a claim as this court will ratify. The amendment would alter the whole nature of the case; and although amendments are, in many cases, allowed in an appellate court, this is not such a case. Cited, 9 Cranch 244, 284; *The Edward*, 1 Wheat. 261; 7 Cranch 570; *The Divina Pastora*, 4 Wheat. 52.

The following points were presented for the consideration of the court:

1. That it was the duty of the libellants, as pilots, to give any assistance in their power to vessels in distress, within the limits of their pilot ground; and this being a service rendered in discharge of their duty, forms no case for a claim of salvage. 2. That the act of congress leaves the regulations of pilots *to the state laws; and by the law of Alabama, any extra [*111 allowance claimed by pilots, must be fixed by the wardens of the port. 3. That the district court of Alabama had no jurisdiction in this case.

By the libel, it appears, that the libellants were pilots of the port of Mobile, in Alabama; and the first question for the consideration of the court is, whether pilots can claim salvage under the circumstance of this case? The principles of law which regulate such claims—claims for compensation and reward for services which are performed in the ordinary course of the duties of the situation of the person who performs them, *virtute officii*, are reported in the case of *Le Tigre*, 3 W. C. C. 570-71. A pilot is not entitled to salvage, unless he goes beyond his ordinary duties. A person who is bound to render assistance in saving a ship, cannot be considered a salvor. *The Neptune*, 1 Hagg. Adm. 266; *The Joseph Harvey*, 1 Rob. 257. A pilot is not to claim as a salvor. Bee 212. A case has been decided by Mr. Justice THOMPSON, in the circuit court of the southern district of New York, in which pilots who had rescued the ship from great danger, were not admitted to be salvors. *The Wave*, 2 Paine 131. The danger in which the vessel may be, does not lessen the duty of a pilot to rescue and save her. When a vessel is in distress, and is found in that situation by pilots, on their cruising ground, it is their duty, as pilots, to bring her into port. If the services have been great, they are entitled to extra pilotage, to be decided according to the laws of the state of which the

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port out of which the pilots cruise is a part. The regulations of pilots of the port of Mobile, make provision for extra compensation in such cases; and in conformity with these regulations, and under them, the libellants were bound to present their claims. It was contended, that the case of *The Wave* was, in all important particulars, the same as the case before the court. The Wave was outside of the port of New York, was in great peril, and was boarded, off Sandy Hook, by the pilots. The court would allow no salvage.

*112] On the second point, it was argued, that if the libellants cannot claim as salvors, they cannot claim extra compensation by proceeding in the district court by a libel. The compensation or extra allowance must be fixed, according to the laws of Alabama, by the wardens of the port of Mobile. It is admitted, that claims for services rendered by pilots which may entitle them to extra allowances, may be entertained in the admiralty; but the admiralty jurisdiction of the courts of the United States in such cases is concurrent with that of the courts of the states—it is not exclusive. In the same manner, actions for seamen's wages may be maintained in the courts of common law, although they are more properly of admiralty proceedings. It is for convenience, as all the seamen of a ship may be joined in a libel for wages, that such claims are generally presented in the admiralty; and not because the admiralty has exclusive cognisance of them. The jurisdiction of the courts of common law and of courts of admiralty being concurrent, the recovery in both courts should be the same, and should be regulated and limited by the provisions of a law applicable to the case. To suppose, that proceedings in one court would produce a different result, a higher or a lower rate of compensation, would not be proper. The principles of the law in both courts should be alike, as would be the evidence; and the application of these principles should be the same. If, then, a compensation is fixed by law for the services of a pilot, he cannot, by coming into the admiralty, ask a greater compensation than is allowed him by a law applicable to the case. If, by the provisions of a law, extra compensation is to be given, and the manner in which the amount of such compensation is to be determined is fixed; no recovery can be had in the admiralty, until after a proceeding under the provisions of the law, shall have determined the amount of the allowances; and that alone can be recovered in the admiralty. Has the law fixed any compensation for the services of pilots, who perform ordinary or extraordinary duties?

The constitution of the United States gives to congress the power to regulate commerce. Under this power, it may be, that congress might regulate the pilots in all the ports of the United States; but it is not admitted, that they could do this to the full *extent; they could not regulate *113] the compensation to pilots, for, if they could, they might regulate the wharves and fix the rate of wharfage in all the sea-ports. The duties of pilots, their regulation, their compensation, are properly left to the legislatures of the states of the Union. Congress, whatever may be their powers, have, by an act passed on the 7th of August 1789, § 4 (1 U. S. Stat. 54), declared that pilots in the ports of the United States shall be regulated by state laws. By this provision, the laws of the states are to govern in all the claims made by pilots, until congress shall interfere. Alabama has passed laws for the government and regulation of pilots and pilotage; the rate for

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the ordinary service of pilots is fixed, and provision is made for determining the compensation for extraordinary services. This is to be determined by the wardens of the port. Their law is in all respects the same as the law relative to pilots in New York.

It has been decided by Mr. Justice THOMPSON, in the case of *The Wave*, that congress has, by their act of 1789, adopted all the laws of the states in relation to pilots. If so, then the libellants could not proceed in the district court of Alabama, as that court had no jurisdiction of the case.

Southard, for the appellees.—The libellants are pilots of the outer harbor of Mobile ; and their duty is to conduct vessels from the gulf of Mexico into the bay of Mobile. They performed services by which the brig Hope and cargo were saved from a total loss and entire destruction ; and by the district court of the United States for the district of Alabama, they have been allowed one-third of the value of the property saved, as salvage. They presented themselves before that court as salvors, and their claim is purely a question of salvage. This claim is distinctly made in the libel, as a claim for salvage ; and it will be treated as such, in the argument now addressed to the court.

It is not denied, that the services of the libellants were meritorious. They boarded the vessel, when she was in extreme peril, while she was yet aground, before she floated off, by the change of wind ; she was saved from being driven to the opposite shoal, *where she would have been totally wrecked. All the duty required from pilots had been done, when [*114 the Hope had been conducted up to the inner harbor of Mobile. For twenty-seven hours, the pilot who had navigated her up to Mobile had been on board of the Hope, and he was properly discharged ; all that could be required of a pilot of the outer harbor had been done, and his connection with the vessel was at an end. If, after a vessel arrives in the inner bay, a pilot is wanted, a pilot of that bay is called upon. Thus, one of the libellants who had piloted the vessel up the bay, had ceased to have any connection with her ; and the other libellants never had anything to do with her, until they went on board of her, after the disasters had occurred which had driven her on shore. For two hours after the pilot had left her, she had remained at anchor. If, within that time, her situation had become such as to require a pilot, if she had become dismasted, cast away, sunk, no duties could have been called for from the pilot of the outer harbor. Pilots are not general conservators of shipping. They are not to be called upon, more than any other persons, to save vessels.

The Hope had been driven out to sea ; she was on shore half a mile out of Mobile point ; she was in no "port," no "harbor," no "bay," which are the places mentioned in the act of congress of 1789. The place where she lay was on "the high seas," beyond the local jurisdiction of the state of Alabama, or of any state—in no county. All the authorities make the place the "high seas." It was where "the winds and waves prevail without check or control;" beyond the *fauces terræ*. She was a wreck on the ocean.

Other facts are proper to be considered. The ship and cargo were in a situation of imminent peril ; her masts and spars were cut away ; she had no cable, no anchor ; all were lost. She was striking on the ground, amidst

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the breakers ; had sprung a leak, and had two feet of water in her hold, before she struck on the bank, and upwards of three feet, when she floated, with the libellants on board ; her pumps were choked ; she had a signal of distress at the stump of the mast ; the captain and crew had deserted her to save their lives, and there was no living man on board. *The Hope [115] was not in a situation to require a pilot. No pilotage services would have been useful to her ; and the evidence shows, that such was the opinion of the master, for he did not call on the libellants as pilots, to go to the rescue of the vessel. While she was in this situation, some persons, other than the libellants, went on board of her and saved some articles. They could not remain with her, and she was again abandoned and deserted. Twenty-four hours afterwards, the libellants took charge of her. The articles saved from the vessel, before the libellants boarded her, were the subject of salvage. These circumstances, and others of equal importance, of the same character, exhibit a case of property actually rescued by the libellants from entire loss, at a general hazard to them, and with great labor and difficulty. If they are considered as salvors by this court, the allowance of the district court must be ratified. Salvage is the reward for efficient services ; and it is a premium which is given to induce like efforts, when, by the casualties of the ocean, they are required. The proposition of the counsel for the appellants is, that the libellants were pilots, and not salvors. If this is the case, pilots can never be salvors. To show that this is not the law, the following cases were cited : *The Helen*, 3 Rob. 183 ; *The Apollo*, Ibid. 249 ; *The Two Catharines*, 2 Mason 335, 338 ; 2 Cranch 268.

To carry the principle contended for by the counsel of the appellants into effect, would produce the highest injustice. An officer performing acts within the sphere of his duty, is not to ask for more than his regular compensation ; but beyond it, and out of the line of his duty, there is no reason why services so extensive, if meritorious, shall not be rewarded. 3 Kent's Com. 197-8. To say, that pilots shall not have salvage in any case, is a dangerous position ; dangerous to humanity, dangerous to commercial property, and ought not to be admitted.

As to the appellant's second point, it is submitted, that to maintain it, counsel must show that, by law and regulation, it was the duty of the pilots to save the Hope in the situation in which she was. As she was not in any of the places mentioned in the act of congress of 1789 ; in no "port," no [116] "harbor," no "bay," no **"haven," the act does not apply : the law, on a doubtful point, should not receive a severe construction.

But the constitutionality of that law, if correctly construed by the counsel for the appellants, may be doubted. If there can be power in the states to regulate pilots in the bays, harbors and havens of the United States ; if congress can give such powers ; the whole jurisdiction of the admiralty may be surrendered, and no longer exist in the courts of the United States. If congress can authorize the regulation of pilots in harbors, by the states, no power exists in congress to give to the states the regulation of pilots on the high seas. It may be doubted, if congress can say to a party who has a case of admiralty and maritime jurisdiction, your case shall be decided by the wardens of a port, in one of the states. The act of 1789 was but temporary, as it provides for the regulation of pilots by the states, until otherwise regulated. Pilotage is a subject, from its very nature, of admiralty juris-

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diction ; and it is also of common-law jurisdiction. But it is denied, that congress can prevent its being cognisable in courts of admiralty, incumbered by state laws ; although it shall be allowed to be within the concurrent jurisdiction of the courts of common law. The argument, that pilotage cannot be the subject of jurisdiction in two courts, is not sound. Such concurrent jurisdiction frequently exists. Cases are sustained in courts of common law, which are also cognisable in courts of chancery. A larger relief is often sought and obtained in chancery, than is afforded at common law.

If the case of *The Wave* shall be considered as influencing the claim of the libellants, it is submitted, that, as the pilot laws of New York were passed before the act of congress of 1789, that act might be considered as having adopted those laws : but Alabama was not a state in 1789 ; and it will not be claimed, that by prospective legislation, congress could adopt state laws to be enacted at a future period. The case of *The Wave* was, in all its material features, different from that of the *Hope*. *The Wave* was within the *fauces terrae* ; within the pilot ground ; within a bay, a haven, and subject to the laws regulating pilots : and in that case, it was said by *the judge, that pilotage is of admiralty jurisdiction ; and he also [*117 says, that there may be cases in which pilots may be salvors. This is stated after a full examination of all the decided cases.

Ogden, in reply, argued, that in the situation the *Hope* was, when boarded by the libellants, nearly afloat, she should have been brought by the libellants into Mobile, in their capacity of pilots. Had she been found at sea, and in a state of wreck, deserted, the pilots, as pilots, should have taken charge of her.

Until congress shall pass laws regulating pilots, they are necessarily of state regulation. They reside in the particular states, and their transactions are essentially connected with the safety and welfare of the citizens, and with the business of the states where they reside. Unless prohibited by congress, the establishment of a system for their government seems of essential importance and necessity. When congress declared that pilots should be regulated by state laws, they did not take away the admiralty jurisdiction. They oblige the pilot to submit to the regulations of the states as to the amount of pilotage ; but this ascertained, he may enforce its payment, in an admiralty proceeding.

Story, Justice, delivered the opinion of the court.—This is an appeal from a decree of the district court for the southern district of Alabama, in the case of a libel for salvage, instituted in the court below by the appellees. That decree awarded to the appellees one-third of the appraised value of the brig and cargo as salvage—the appraised value being \$15,299.58.

The material facts of the case are as follows : The brig *Hope*, belonging to Charlestown, near Boston, being on a voyage from the Havana to the port of Mobile, on the 24th of January 1832, took a pilot (who was one of the libellants), about ten miles W. S. W. from Mobile point, by whom she was conducted inside of Mobile point, to the place where the pilots at the outward bar of that point usually leave vessels, which they pilot inside of that bar, about half past seven o'clock of the evening of the next day ; and

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he was then discharged by the master of the brig. The brig then proceeded on her course up the bay of Mobile, and came to *anchor, about nine [118] o'clock the same evening. About this time, the wind changed to the north-west, and in the course of the night, it blew a violent gale ; the brig parted both her anchors, and was driven outside of Mobile point about two miles, and then brought up among the east breakers. At this time, the gale had increased to a hurricane, the sea broke over the brig in every direction, and forced her on her beam-ends. At five o'clock in the morning, the masts and the bowsprit were cut away, to relieve and right her, for the safety of the vessel, cargo and crew, and a signal of distress was hoisted. At noon, the flood-tide making, the breakers increasing, and the gale continuing, there being two feet of water in the hold, and the pumps being choked with coffee, the master and crew, to save their lives and the ship's papers, left the brig in the long-boat, and made for the shore, and were taken up by the custom-house boat. On the evening of the next day, the master of the brig made arrangements with the libellants, who are all pilots of the port of Mobile, with their boats and the crew of the brig, to make efforts to extricate the brig and cargo from their perilous condition. Accordingly, the next morning, an attempt was made by the libellants and the master (the mate and the crew of the brig declining to assist) to get on board of the brig ; but it still blew so fresh, that it became impossible to board her. The master of the brig then went on shore from the pilot boat, which anchored at Mobile point. About one o'clock of the same day, the brig shifted her position, and the libellants discovered her to be nearly afloat. The pilot boats were then got under weigh, and in about three-quarters of an hour afterwards, the libellants being then on board, and no other persons, the brig floated. At this time, the wind was blowing fresh from E. S. E.; and if the brig had not been taken possession of by the libellants, she would have been drifted on the west bank, and have become a complete wreck. The brig was then towed by the pilot boats, and a steamboat procured by the libellants, to the port of Mobile, in the course of the two succeeding days. Such are the material facts.

In the course of the proceedings in the court below, an agreement was asserted to have been made between the parties, that in case the vessel [119] and cargo should be saved, the compensation *should be fixed by the chamber of commerce of Mobile. That agreement, however, is denied by the libellants to have been applicable to the actual circumstances of the case ; and no compensation was, in fact, awarded by the chamber of commerce. That agreement has not been insisted on here, in the argument on either side ; and, indeed, being to a mere amicable tribunal, as arbitrators, it could not, in a case of this sort, be now insisted upon, to bar the jurisdiction of the court. It is wholly unlike the case where a positive law has fixed the mode of ascertaining the compensation.

No objection has been made to the amount of salvage decreed by the court below, if the libellants are entitled to any. And the objection has been properly abandoned ; for the amount, under the circumstances, is certainly not unreasonable. Besides, this court is not in the habit of revising such decrees as to the amount of salvage, unless upon some clear and palpable mistake or gross over-allowance of the court below. It is equally against sound policy and public convenience, to encourage appeals of this

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sort, in matters of discretion ; unless there has been some violation of the just principles, which ought to regulate the subject.

Three objections have been made to the decree : First, that it was the duty of the libellants, as pilots, to give every assistance in their power to a vessel in distress, within the limits of their pilot ground ; and that this, being a service rendered in the discharge of their duty, forms no case for a claim of salvage. Secondly, that the act of congress on this subject (Act of 7th of August 1789, ch. 9), leaves the regulation of pilots to the state laws; and that by the laws of Alabama, any extra allowance claimed by these pilots must be fixed by the wardens of the port. Thirdly, that the district court had no jurisdiction of the case.

In respect to the last objection, it has been urged in a very limited form, not as an objection to the jurisdiction of the courts of admiralty to entertain suits for pilotage generally; but only for pilotage, under circumstances like the present, where a fixed compensation is established, under the authority of congress, by the state laws. We are of opinion, that suits for pilotage on the high seas, and on waters navigable from the sea, as far as the tide ebbs and flows, are within the admiralty and maritime jurisdiction of the United States. The service is strictly maritime, and falls within the principles already established by this court in the case of *The Thomas Jefferson* (10 Wheat. 428) and *Peyroux v. Howard* (7 Pet. 324). The other part of the objection is not, in our opinion, maintainable. The jurisdiction of the district courts of the United States, in cases of admiralty and maritime jurisdiction, is not ousted by the adoption of the state laws by the act of congress. The only effect is to leave the jurisdiction concurrent in the state courts ; and, if the party should sue in the admiralty, to limit his recovery to the same precise sum to which he would be entitled under the state laws adopted by congress, if he should sue in the state courts.

The second objection has been met at the bar by an argument of a grave cast, viz., that the act of congress, so far as it adopts the future laws to be passed by the states on the subject of pilotage, is unconstitutional and void; for congress cannot delegate their powers of legislation to the states ; and that as Alabama was not admitted into the Union as a state, until the year 1819, and its laws on this subject have been long since passed (in 1822), these laws are, *ipso facto*, nullities. This question was much discussed in the case of *Gibbons v. Ogden* (9 Wheat. 207-8), and may not be without difficulties. But we are spared from any discussion of it, on the present occasion, because we are of opinion, that the present is not a case of pilotage, but of salvage; and congress have never confided to the states any power to regulate salvage on the sea, or on tide-waters ; but the same belongs to the district courts, in virtue of the delegation to them of admiralty and maritime jurisdiction.

Whether, indeed, this be a case of salvage or not, is the point involved in the first objection ; and we shall now proceed to state the reasons, why we are of opinion, that it is such a case. We agree to the doctrine stated in the cases cited at the bar, that a pilot, while acting as such, in the strict line of his duty, however he may entitle himself to extraordinary pilotage compensation, for extraordinary services, as contradistinguished from ordinary services, cannot be entitled to claim *salvage. In this respect, he is not distinguished from any other officer, public or private, acting

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within the appropriate sphere of his duty. But a pilot, as such, is not disabled, in virtue of his office, from becoming a salvor. On the contrary, whenever he performs salvage services beyond the line of his appropriate duties, or under circumstances to which those duties do not justly attach, he stands in the same relation to the property as any other salvor; that is, with a title to compensation to the extent of the merit of his services, viewed in the light of a liberal public policy. Sir WILLIAM SCOTT, in the case of *The Joseph Harley* (1 Rob. 257), speaking upon this subject, where pilots were claiming as salvors, said, "This is a petition praying salvage; and it is said by his majesty's advocate, that it is impossible for these persons to claim salvage, as there is little more than pilotage due; although it is allowed, that the court may, in cases of pilotage, as well as of salvage, direct a proper remuneration to be made. It may be, in an extraordinary case, difficult to distinguish a case of pilotage from a case of salvage properly so called; for it is possible, that the safe conduct of a ship, under circumstances of extreme personal danger and personal exertion, may exalt a pilotage service into something of a salvage service. But, in general, they are distinguishable enough; and the pilot, though he contributes to the safety of a ship, is not to claim as a legal salvor." From this language, it is obvious, that the learned judge had in his mind the distinction between extraordinary pilotage services, and salvage services properly so called; the one clearly going beyond the mere line of duty, and the other going merely to the extreme line of duty. In the case of *The Aquila* (1 Rob. 37), where a magistrate, acting in discharge of his public duty, demanded to be considered as a salvor, the same learned judge said: "This, however, is certain, that if a magistrate, acting in his public duty, on such an occasion, should go beyond the limits of his official duty, in giving extraordinary assistance, he would have an undeniable right to be considered as a salvor." The same principle was fully recognised by Mr. Justice WASHINGTON, in the case of *Le Tigre* (3 W. C. C. 189-71), in which, after stating that ordinary official duties were not to be compensated by salvage, he added, "Of this class of cases is that of a pilot, *who safely conducts into port a vessel in distress at sea. He [122] acts in the performance of his ordinary duty, imposed upon him by the law and nature of his employment; and he is, therefore, not entitled to salvage, unless in a case where he goes beyond the ordinary duties attached to his employment." Mr. Justice THOMPSON, in the case of *The Wave*, cited at the bar, maintained the same doctrine, upon an elaborate review of all the cases. (2 Paine 131.) It has also been applied to another very meritorious class of cases; we mean that of seamen, who, in the ordinary course of things, in the performance of their duties, are not allowed to become salvors, whatever may have been the perils or hardships or gallantry of their services in saving the ship and cargo. We say, in the ordinary course of things; for extraordinary events may occur, in which their connection with the ship may be dissolved *de facto*, or by operation of law, or they may exceed their proper duty; in which cases they may be permitted to claim as salvors. Such was the case of the seamen left on board in the case of *The Blaireau* (2 Cranch 268); and such was the exception alluded to in the case of *The Neptune* (1 Hagg. Adm. 236-7.(a)) In this last case, Lord STOWELL, after saying,

(a) See § Kent Com. Lect. 47, p. 199 (1st edit.); *The Two Catharines*, 2 Mason 819; *Newman v. Walters*, 3 Bos. & Pul. 612.

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that the crew of a ship cannot be considered as salvors, gave what he deemed the definition of a salvor : "What (said he) is a salvor? A person, who, without any particular relation to a ship in distress, proffers useful services, and gives it, as a volunteer adventurer, without any pre-existing covenant, that connected him with the duty of employing himself for the preservation of that ship." And it must be admitted, that, however harsh the rule may seem to be, in its actual application to particular cases, it is well founded in public policy, and strikes at the root of those temptations, which might otherwise exist to an alarming extent, to seduce pilots and others to abandon their proper duty, that they might profit by the distresses of the ship, which they are bound to navigate.

Such, then, being the rule, let us see, whether it has any application to the actual circumstances of the present case. In the first place, none of the libellants were, at the time of the service *performed, at all connected with the Hope, in the character of pilots. The pilot had been [*123 regularly discharged, at the usual place, after arriving at Mobile point ; and he became, therefore, as to her, *functus officio*, until there was some new call for pilot duty. Now, the subsequent services, asked by the master, and proffered by the libellants, as the very agreement suggested in the proceedings abundantly shows, was not understood by either of the parties to be for mere pilot services, but for services of a far different and more extensive nature and character than belong to such an employment. Indeed, in no just sense can the services of these libellants be deemed to fall within the scope of the duties of pilots. Lord TENTERDEN, in his excellent Treatise on Shipping (part 2, ch. 5, § 1, p. 148), has defined a pilot to be "a person, taken on board at a particular place, for the purpose of conducting a ship through a river, road or channel, or from or into a port." His duty, therefore, is properly the duty to navigate the ship over and through his pilotage limits, or, as it is commonly called, his pilotage ground. The case, therefore, necessarily pre-supposes, that the ship is in a condition capable of being navigated ; distressed, if you please, and laboring under difficulties, but still capable, in point of crew, equipment and situation, of being navigated. No one ever heard of its being within the scope of the positive duties of a pilot, to go to the rescue of a wrecked vessel, and employ himself in saving her or her cargo, when she was wholly unnavigable. That is a duty entirely distinct in its nature, and no more belonging to a pilot, than it would be to supply such a vessel with masts or sails, or to employ lighters to discharge her cargo, in order to float her. It is properly a salvage service, involving duties and responsibilities, for which his employment may peculiarly fit him ; but yet in no sense included in the duty of navigating the ship. Lord ALVANLEY, in *Newman v. Walters* (3 Bos. & Pul. 616), puts a case far short of that which is here presented, as a clear case of salvage. "Suppose (said he), a tempest should arise, while the pilot is on board, and he should go off in a boat to the shore, to fetch hands, and should risk his life for the safety of the ship, in a manner different from that which his duty required ; in such a case, it seems to me, that he would be entitled to a compensation in the nature of *salvage ; and I am glad that Sir WILLIAM SCOTT appears to entertain the same opinion." Now, in the [*124 case here supposed, the pilot had already acquired a relation to the ship, by

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having actually entered upon the service as such ; and yet the learned judge holds it, upon principle, a clear case of salvage.

What were the circumstances under which the present service was performed ? The brig was stranded upon a bank, with the sea rolling over her ; her masts and bowsprit were cut away ; her pumps were choked ; two feet of water were in her hold ; she was deserted by her master and crew, and incapable of navigation by herself ; and even when gotten off, she was navigated only by being towed by two pilot boats and a steamboat into port. At this time, the libellants had no official connection whatsoever with her, as pilots. Where, then, was the obligation on them to go on board and take charge of a wreck, and to hazard their lives and property, and to apply their labor to deliver the brig and cargo from their present imminent perils, any more than on any other persons ? We know of none. We think, the whole enterprise was an enterprise of salvage, and not of pilotage. It was a case, where they acted as salvors strictly, according to the definition of Sir WILLIAM SCOTT. They had, at the time, no particular relation to the distressed ship ; they proffered useful services as volunteers, without any pre-existing covenant that connected them with the duty of employing themselves for her preservation. The duties they undertook were far beyond any belonging to pilots, and precisely those belonging to salvors.

For these reasons, therefore, we are of opinion, that the decree of the district court of Alabama ought to be affirmed, with costs.

THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the southern district of Alabama, and was argued by counsel : On consideration whereof, it is adjudged and decreed by this court, that the decree of the said district court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum, on the amount decreed by the said district court as salvage.

*125] *UNITED STATES, Plaintiffs in error, v. The Heirs and Representatives of JOSEPH H. HAWKINS, deceased.

Suits against public officers.

Although a *venire de novo* is frequently awarded by a court of error, upon a bill of exceptions, to enable parties to amend, and though amendments may, in the sound discretion of the court, upon a new trial, be permitted, the *venire de novo* is, in no instance, anything more than an order for a new trial, in a cause in which the verdict or judgment is erroneous in matter of law ; and is never "equivalent to a new suit :" no statute of the United States alters the law in this regard.

It has never been the practice of the circuit courts, in suits under the law of the 3d March 1797, to deny to defendants a claim for credits against the United States, because they had not been presented and disallowed, before the commencement of the suit ; the practice to allow a claim for credits, after the suit has been commenced, is sustained by the spirit and letter of the third and fourth sections of the statute. When a defendant seeks to obtain a continuance, to prevent judgment from being granted to the United States, at the return-term of the cause, he is required by the third section, to make oath or affirmation, that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury department, and rejected ; but the fourth section, which directs that no claim for a credit shall be admitted upon trial, but such as shall appear

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to have been presented to the accounting officers of the treasury, and by them disallowed, the words, "previous to the commencement of the suit," are omitted; and further provision is made for a claim for credits, at the time of trial, when it shall be proved to the satisfaction of the court, that the defendant is in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credits, at the treasury, by absence from the United States, or some unavoidable accident. Thus showing it to be an inflexible requirement of the statute, that the defendant shall have had his claim for credits disallowed, before he can prevent the United States from getting judgment at the return-term, by a continuance of the cause; and that he may have them submitted to a jury at the trial, if they have been refused by the accounting officers of the treasury, after the suit has been instituted; or if he can bring himself within either of the liberal provisions of the fourth section of the act of the 3d March 1797.

If a navy agent, without a receipt from a purser, upon a requisition for money, volunteer to pay demands which it is the purser's duty to pay, or pay the orders of a purser, and permit the receipts for the sums paid by him to get into the purser's possession, by whom they are exhibited at the treasury, and allowed in the final settlement of his account, without the purser's having given credit to the navy agent, or to the government, for the amount, it assumes the character of a private transaction between the purser and the navy agent, or becomes a debt due from the purser, as an individual, to the navy agent, as a private person; and the latter cannot claim the amount at the treasury, as an allowance in the settlement of his account, nor as a legal and equitable credit, in a suit against him by the United States.

*The statute prevents delinquent officers from delaying the United States, by frivolous pretences, from obtaining judgment at the return-term; gives to the defendant the full [*126 benefit of having every credit to which he may suppose himself equitably entitled, and which has been disallowed, passed upon by a jury; and guards the district-attorney from surprise, by informing him, through the treasury department, before the time of trial, of the credits which have been claimed, and the reasons for the rejection of them. All the provisions of this statute, regulating the institution of suits, and the recovery by judgment of unpaid balances from delinquent officers, are as much a part of their bonds, as if they were recited in them; and officers and their securities are, in contemplation of law, apprised of those provisions, when their bonds are executed.

ERROR to the District Court for the Eastern District of Louisiana. This case was before the court, at January term 1832, on a writ of error to the district court of Louisiana, prosecuted by Nathaniel Cox, Nathaniel and James Dick, plaintiffs in error, *v.* The United States. (6 Pet. 172.) Nathaniel Cox and John Dick, the father of Nathaniel and James Dick, were the sureties of Joseph H. Hawkins, in his official bond to the United States, as navy agent of the United States, at New Orleans. In the district court, a judgment was given in favor of the United States, and the same was reversed for an informality in entering the same.

On the former writ of error, certain questions were raised as to the admission of evidence offered in the district court on the part of the defendants, and rejected by the court. This court sustained the decision of the district judge. (6 Pet. 200.) The judgment of the district court of Louisiana having been reversed, the cause went back to the court on the following mandate:

"Whereas, lately, in the district court of the United States for the eastern district of Louisiana, before you, in a cause wherein the United States of America was plaintiff, and the heirs and representatives of J. H. Hawkins, the heirs and representatives of John Dick, and Nathaniel Cox, were defendants, the judgment of the said district court was in the following words, viz: 'The court having maturely considered the motion in arrest of judgment, now order that judgment be entered up as of the *15th instant, against the estate of John Dick and Nathaniel Cox, jointly [*127

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and severally, for the sum of \$20,000, with six per centum interest, from the 2d day of January 1830, until paid, and costs of suit, and that judgment be entered up against Nathaniel Dick and James Dick, for the sum of \$10,000 each, with six per centum interest, from the 2d day of January 1830, until paid, and costs : As by the inspection of the transcript of the record of the said district court, which was brought into the supreme court of the United States by virtue of a writ of error, agreeable to the act of congress in such case made and provided, fully and at large appears. And whereas, in the present term of January, in the year of our Lord 1832, the said cause came on to be heard before the said supreme court, on the said transcript of the record, and was argued by counsel, on consideration whereof, it is adjudged and ordered by this court, that the judgment of the said district court in this cause be and the is hereby reversed ; and this cause be and the same is hereby remanded to the said district court, with direction to award a *venire facias de novo*. You, therefore, are hereby commanded, that such further proceedings be had in said cause, as according to right, justice and the laws of the United States ought to be had, the said writ of error notwithstanding."

Further proceedings took place in the cause, in the district court, which are stated at large in the opinion of the court. A verdict was rendered against the United States ; and exceptions being taken to the charge of the court, the United States prosecuted this writ of error.

The case was argued by *Butler*, Attorney-General, for the United States ; no counsel appearing for the defendants in error.

He stated, that, on the former trial in the district court, the allegation was, that certain sums had been paid at the treasury which had not been allowed in favor of the defendant, Nathaniel Cox. These claims were not the matters of defence on the second trial ; but it was alleged, that balances were due to Cox, on a separate transaction with the United States, and *128] *which were the subject of a separate suit between the defendant, Cox, and the United States. The original claim on the defendant was for upwards of \$15,000, which was reduced by payments into the treasury to \$2870.62. It is admitted, that Nathaniel Cox is entitled to a further credit of \$1320, although the same was not regularly established in the district court ; and this sum may be allowed to him as an off-set to the judgment to which, on this record, the United States are entitled. To admit this sum to his credit, in the present state of the case, would reduce the claim of the United States below the amount required to sustain the jurisdiction of the court ; and it is now acknowledged, that this credit shall be ultimately allowed ; but in such a form as that this court can retain and decide the case.

The United States object to the items of credit claimed by Cox, the defendant in error ; not only on account of the irregularity of the proceedings, but also because they are not credits to which he was in any manner entitled. On the last trial in the district court, these credits were objected to. They had not been claimed at the treasury, prior to the institution of the suit ; but before the second trial, they were exhibited at the treasury, and they were refused. At this trial, after the mandate, they were admitted ; the district court considering the case as standing in the situation of

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a new suit. These credits, now objected to, and which were improperly allowed to go to the jury, were claimed in a supplemental answer, filed after the mandate, on the 10th March 1834. They were the sum of \$5840.54, paid by reason of certain checks, &c., issued by purser Wilkinson, and disallowed at the treasury; and also the sum of \$1433.12, also paid under the same circumstances. Mr. Cox had been appointed navy agent, after the death of Hawkins.

It was contended, that the objections to these claims of credit were well taken by the district-attorney of Louisiana, in the bills of exceptions, on two grounds: 1. It did not appear that the documents to sustain them had been presented to the proper officers of the treasury, before the commencement of this suit by petition, filed October 19th, 1823. 2. That it appeared, that those sums had been already allowed to purser Wilkinson. *Notwithstanding these objections, the district judge allowed them to be read in evidence, as competent testimony. The court stated to [*129] the jury, that although the credits had been allowed to purser Wilkinson, it was no reason they should not be allowed to Mr. Cox, if the jury thought they were equitably due.

WAYNE, Justice, delivered the opinion of the court.—On the 19th October 1825, the United States instituted a suit in the district court of the United States for the eastern district of Louisiana, according to the practice of that state, upon a bond of Joseph H. Hawkins, as principal, and Nathaniel Cox and John Dick, as sureties, in the penalty of \$20,000, with the condition “that if Joseph H. Hawkins shall regularly account, when thereto required, for all public moneys received by him, from time to time, and for all public property committed to his care, with such person or persons, officer or officers of the government of the United States, as shall be duly authorized to settle and adjust his accounts, and shall, moreover, pay over, as may be directed, any sum or sums that may be found due to the United States upon any such settlement or settlements, and shall faithfully discharge, in every respect, the trust reposed in him, then the said obligation to be void and of no effect, otherwise to remain in full force and virtue;” and assigned as a breach of the condition of the bond, that the said Hawkins did not in his life-time regularly account for all the public moneys received by him, &c., but did, at his death, remain indebted to the United States in the sum of \$15,553.18 for moneys received by him as navy agent, from the United States, since the date of the bond. Hawkins being dead, and without legal representatives, and Dick, one of his sureties, being also dead, at the time of the institution of the suit, but having legal representatives; the latter, with Cox, the other surety of Hawkins, appeared, according to the practice of Louisiana, and put in separate answers and defences.

A verdict was found for the United States, and judgment entered up against the estate of John Dick and Nathaniel *Cox, jointly and severally, for the sum of \$20,000; and also, against Nathaniel Dick and James Dick, the representatives of John Dick, for the sum of \$10,000 each. The defendants then paid into court the sum of \$12,682.46, on account of the judgment, and sued out separate writs of error to this court; and the judgment was reversed, as may be seen by the report of the case, in 6 Pet.

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172, with directions to award a *venire facias de novo*. Upon the return of the mandate, the defendant Cox petitioned the district court to be allowed to file a supplemental answer, in which he pleads as a set-off, debts alleged to be due to him by the United States; one in his own right of \$1320.27, balance of account in his capacity of United States navy agent, settled at the treasury department, as appears by a certified copy, filed in another suit in said court; and two other sums alleged to be due to him by the United States, for payments made by him, in his capacity of navy agent, on account of the United States, upon the checks and vouchers of one Joseph B. Wilkinson, then a purser of the United States on the Orleans station, which he states had been presented and disallowed at the treasury department. Against the defendant's application to file the supplemental answer, the district-attorney of the United States objected, "that the sums pleaded as set-off were foreign to the matters in controversy between the parties;" and, secondly, "that the sums cannot be admitted as a credit at the trial of the cause, under the third and fourth sections of the act of congress of the 3d March 1797, inasmuch as the same were not, previous to the commencement of this suit, submitted to the accounting officers of the treasury, and rejected." The objections of the district-attorney were overruled by the court, leave was given to file the answer; the court expressing its opinion, "that the mandate of the supreme court, ordering a new trial, authorized the plea to be filed, and that the defendant might equitably be allowed, under the said act of congress, to establish, by proof, the sums claimed to be due by way of credit."

Distinguishing between the judicial discretion of the court to permit a supplemental answer to be filed, or to a defendant, upon a *venire facias de novo*, to amend, to enable him to avail himself *of a proper defence, [131] which he had not pleaded on the first trial, we will here merely remark, that the objections of the district-attorney should have prevailed against the allowance of it in this instance, for reasons which will be found to apply, when we shall discuss the exceptions taken by the district-attorney to the judgment, by which this cause has again been brought to the supreme court by writ of error.

Upon the supplemental answer, however, the cause was carried to trial. The district-attorney objected to the introduction of certain bills, orders or documents offered by the defendant as evidence to sustain the set-off in his supplemental answer, on the ground, that they were not "sustained by bills or receipts showing the same were paid to persons in public service, or for furnishing materials or articles for public service, or that they had been approved by the commanding naval officer at New Orleans." "That it does not appear that the documents, bills or orders had been presented to the proper accounting officers and disallowed, previous to the commencement of this suit. That it appeared from the document, that the sums mentioned in it and claimed as a set-off by Cox, the defendant, had been already allowed to purser Wilkinson." The court overruled the objections, permitted the bill and vouchers to be read to the jury, expressing its opinion, that they were "competent testimony to be weighed by the jury, and that the mandate of the supreme court requiring the cause to be sent back with directions to issue a *venire de novo*, might probably be regarded as equivalent to a new suit, within the statute."

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Without going into the doctrine, in what cases, or for what causes, a *venire de novo* will be directed, it is sufficient for us to say, though it is frequently awarded by a court of error, upon a bill of exceptions, to enable parties to amend, and though amendments may, in the sound discretion of the court, upon a new trial, be permitted, the *venire de novo* is, in no instance, anything more than an order for a new trial, in a cause in which the verdict or judgment is erroneous in matters of law; and is never "equivalent to a new suit." No statute of the United States alters the law in this regard.

In regard to so much of the exception which objects to the *introduction of the bills, orders or documents claimed as credits in the defendants' supplemental answer—because they had not been presented to the proper accounting officers, and disallowed, previous to the commencement of the suit—we remark, it has never been the practice of the circuit courts, in suits under the law of the 3d March 1797, to deny to defendants a claim for credits against the United States, because they had not been presented and disallowed, before the commencement of the suit. The practice to allow a claim for credits, after the suit has been commenced, is sustained by the spirit and letter of the third and fourth sections of the statute. When a defendant seeks to obtain a continuance, to prevent judgment from being granted to the United States at the return-term of the cause, he is required, by the third section, to make oath or affirmation that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the consideration of the accounting officers of the treasury department, and rejected; but in the fourth section, which directs that no claim for a credit shall be admitted upon trial, but such as shall appear to have been presented to the accounting officers of the treasury, and by them disallowed, the words, "previous to the commencement of the suit," are omitted; and further provision is made for a claim for credits, at the time of trial, when it shall be proved to the satisfaction of the court, that the defendant is in possession of vouchers, not before in his power to procure, and that he was prevented from exhibiting a claim for such credits at the treasury, by absence from the United States, or some unavoidable accident. Thus showing it to be an inflexible requirement of the statute, that the defendant shall have had his claim for credits disallowed, before he can prevent the United States from getting judgment at the return-term, by a continuance of the cause; and that he may have them submitted to a jury, at the trial, if they have been refused by the accounting officers of the treasury, after the suit has been instituted, or if he can bring himself within either of the liberal provisions of the fourth section of the act of 3d March 1797. Such was the construction given by this court to the third and fourth sections of that act, in the case of the *United States v. Giles and others*, 9 Cranch 212; and Mr. Justice STORY, giving *the opinion of the court, in the case of the *United States v. Wilkins*, 6 Wheat. 135, [*133] says, the fourth section "prohibits no claim for any credits which have been disallowed at the treasury, from being given in evidence by the defendant at the time of trial." The statute prevents delinquent officers from delaying the United States, by frivolous pretences, from obtaining judgment at the return-term, but gives to the defendant the full benefit of having every credit to which he may suppose himself equitably entitled, and which has been

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disallowed, passed upon by a jury ; and guards the district-attorney from surprise, by informing him, through the treasury department, before the time of trial, of the credits which have been claimed, and the reasons for the rejection of them. All the provisions of this statute, regulating the institution of suits and the recovery by judgment of unpaid balances from delinquent officers, are as much a part of their bonds as if they were recited in them; and officers and their sureties are, in contemplation of law, apprised of those provisions, when their bonds are executed. Whilst our conclusion, therefore, is, that a defendant is not prevented from claiming the benefit of credits which may not have been disallowed, before the commencement of the suit, we do not mean to say, that the credits claimed by the defendant, in his supplemental answer, were proper evidence in this cause.

We will now consider the objections to the credits claimed by the defendant Cox, for payments said to have been made by him on the bills and orders of purser Wilkinson, which were allowed to be given as evidence to the jury ; the court giving its opinion, "that although the credits had been allowed to Wilkinson, it was no reason they should not be allowed to Cox, if the jury thought they were equitably due." This misdirection of the court arose from its misunderstanding the official relations between purzers and navy agents, and their separate accountability to the government. Both are disbursing officers, whose accounts are separately kept at the treasury department ; it being the duty of the navy agent, when he has funds of the government on hand, to comply with the requisitions of the purzers for money ; the latter being sanctioned by the naval officer commanding the station. The purser's receipt to the navy agent upon such *requisition is his voucher for a credit at the treasury ; and the sum *134] received by the purser is disbursed by him in paying officers and seamen, and for such supplies for the service as his commanding officer may sanction. The receipts taken by the purser are his vouchers for credits against the sum received by him from the navy agent ; but before the purser's accounts can be settled at the treasury, the original receipts are deposited by him in that department. It follows, then, that credits which have been allowed to the purser cannot be afterwards claimed by the navy agent, without giving to him a credit twice for the same sum ; the amount of the receipts in detail, and the purser's requisition upon him in gross. Nor can the navy agent ever make a claim for such credits, without having first violated his instructions for the disbursement of government funds.

If a navy agent, without a receipt from a purser, upon a requisition for money, volunteers to pay demands which it is the purser's duty to pay, or shall pay the orders of a purser, and shall permit the receipts for the sums paid by him to get into the purser's possession, by whom they are exhibited at the treasury and allowed in the final settlement of his account, without the purser's having given credit to the navy agent, or to the government, for the amount, it assumes the character of a private transaction between the purser and the navy agent, or becomes a debt due from the purser, as an individual, to the navy agent, as a private person ; and the latter cannot claim the amount at the treasury, as an allowance in the settlement of his account, nor as a legal or equitable credit, in a suit against him by the United States. Such is the attitude of the defendant Cox in the claim which he makes for credits on account of the orders of purser Wilkinson,

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and such would have been the relations between him, purser Wilkinson and the government, if he had sustained by proof, the allegations in his supplemental answer, that he had paid, in his character of navy agent, and for the use of the United States, the bills and orders of purser Wilkinson.

But there is no such proof. The document which the court permitted to be given as evidence, and the only evidence upon which the defendant relies, shows that the credits claimed by him, had been allowed to purser Wilkinson on the settlement of his account ; and it does not *show [*185 any connection between them, entitling the defendant, upon any equitable ground, to credit for any one of the items in that account. If he has any claim upon the conscience of purser Wilkinson, it must rest upon both having disregarded those regulations for the disbursement of public funds, which, when observed, are a protection to each, and which only preserve that responsibility between the officer and the government required by the public interest. In such a case, the defendant must look to purser Wilkinson. The government is not to be involved in the consequences to either, resulting from an irregular disbursement of its funds. If, as may have been the case in this instance, purser Wilkinson, to oblige a discharged mariner, or one to whom his pay was due, when there were no funds on hand to pay him, assumed, by his due bill or order, the amount due, to enable the mariner to have it cashed by any one who would make him the advance, having taken a receipt officially for the sum due by the government ; and the navy agent afterwards took up the purser's due-bill ; he did it for the honor of the purser, and must look to him for repayment. He has not the purser's receipt for the money, but his due-bill, which, if even signed by the commanding officer of the station, and bearing upon its face a connection with the original transaction between the seaman and the service, would not give to the navy agent a legal or equitable claim for a credit at the treasury, because the purser cannot be debited there for any money for which he has not given his receipt in due form.

The judgment of the court below is reversed, and the cause sent back, with directions to issue a *venire de novo*. It is admitted by the attorney-general, that the defendant may be credited with the sum of \$1320.77 ; that sum being really due to him from the treasury : the balance claimed by the government being \$1550.45.

THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that the *judgment of the said district court [*186 in this cause be and the same is hereby reversed ; and that this cause be and the same is hereby remanded to the said district court, with directions to award a *venire facias de novo*.

*NELSON J. ELLIOTT v. SAMUEL SWARTWOUT.

Duties on imports.—Action for duties wrongly paid.—Treasury instructions.

Under the act of congress passed on the 14th of July 1832, entitled "an act to alter and amend the several acts imposing duties on imports," worsted shawls with cotton borders, and worsted suspenders with cotton straps or ends, are not subjected to a duty of fifty per centum *ad valorem*.

Laws imposing duties on importation of goods, are intended for practical use and application by men engaged in commerce; and hence it has become a settled rule in the interpretation of statutes of this description, to construe the language adopted by the legislature, and particularly in the denomination of articles, according to the commercial understanding of the terms used.

A collector of the revenue is not personally liable, in an action to recover back an excess of duties paid as collector, and by him, in the regular or ordinary course of his duty, paid into the treasury of the United States; he, the collector, acting in good faith, and under instructions from the treasury department, and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount, given him.

In case of a voluntary payment, by mere mistake of law, no action will lie to recover back the money; the construction of the law is open to both parties, and each presumed to know it.

The instructions of the treasury department to the collector, cannot change the law, nor affect the rights of a party injured by them; he is not bound to take and adopt that construction; he is at liberty to judge for himself and act accordingly. These instructions from the treasury seem to be thrown into the question in this case, for the purpose of showing, beyond all doubt, that the collector acted in good faith. To make the collector answerable, after he had paid over the money, without any intimation having been given that the duty was not legally charged, cannot be sustained, upon any sound principle of policy or of law; there can be no hardship in requiring the party to give notice to the collector, that he considers the duty claimed illegal; to put him on his guard, by requiring him to not pay over the money; the collector would then be placed in a situation to claim an indemnity from the government. But if the party is entirely silent, and no intimation of an intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the government to indemnify him against a suit. It is no sufficient answer to this, that the party cannot sue the United States; it is the case of a voluntary payment, under a mistake of law, and the money paid over into the treasury; and if any redress is to be had, it must be by application to the favor of the government, and not on the ground of a legal right.

The collector is personally liable, in an action to recover back an excess of duties paid to him as collector, and by him paid over in the regular and ordinary course of his duty into the treasury of the United States, he, the collector, acting in good faith, and under instructions from the treasury department, a notice having been given him, at the time of payment, that the duties were charged too high, and that the party paying, so paid to get possession of his goods, and intended to sue to recover back the amount erroneously paid; and a notice not to pay over the amount into the treasury.¹

It is the settled doctrine of the law, that where money is illegally demanded and received by an agent, he cannot exonerate himself *from personal responsibility, by paying it over to his principal, when he has had notice not to pay it over.

CERTIFICATE of Division from the Circuit Court for the Southern District of New York. The suit was originally instituted in the superior court of the city of New York, by the plaintiff against the defendant, the collector of the port of New York; and was removed by *certiorari* into the circuit court of the United States.

The action was *assumpit*, to recover from the defendant the sum of \$3178, received by him for duties, as collector of the port of New York, on

¹ Actions for the recovery of duties paid under protest, are now regulated by statute: see 1 R. S. § 8011, where the decisions on the subject are collected. And see *Barney v. Watson*, 92 U. S. 449; *Arason v. Murphy*, 109 Id. 288.

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an importation of worsted shawls with cotton borders, and worsted suspenders with cotton straps or ends. The duty was levied at the rate of fifty per centum *ad valorem*, under the second clause of the second section of the act of the 14th July 1832, entitled "an act to alter and amend the several acts imposing duties on imports," as manufactures of wool, or of which wool is a component part. The plea of *non assumpit* was pleaded by the defendant in bar of the action.

The following points were presented, during the progress of the trial, for the opinion of the judges; and on which the judges were opposed in opinion:

1. Upon the trial of the cause, it having been proved that the shawls imported, and upon which the duty of fifty per centum *ad valorem* had been received, were worsted shawls with cotton borders sewed on; and that the suspenders were worsted with cotton ends or straps; and that worsted was made out of wool, by combing, and thereby became a distinct article, well known in commerce under the denomination of worsted; the judges were divided in opinion, whether the said shawls and suspenders were or were not a manufacture of wool, or of which wool is a component part, within the meaning of the words "all other manufactures of wool, or of which wool is a component part," in the second article of the second section of the act of congress of the 14th of July 1832.

2. Whether the collector is personally liable in a action to recover back an excess of duties, paid to him as *collector; and by him, in the regular or ordinary course of his duty, paid into the treasury of the United States; he, the collector, acting in good faith, and under instructions from the treasury department, and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount, given him.

3. Whether the collector is personally liable in an action to recover back an excess of duties paid to him as collector, and by him paid, in the regular and ordinary course of his duty, into the treasury of the United States, he, the collector, acting in good faith, and under instructions from the treasury department; a notice having been given, at the time of payment, that the duties were charged too high, and that the party so paid, to get possession of his goods; and intended to sue to recover back the amount erroneously paid, and a notice not to pay over the amount into the treasury. These several points of disagreement were certified to this court by the direction of the judges of the circuit court.

The case was argued by *Ogden*, for the plaintiff; and by *Butler*, Attorney-General, for the defendant.

Ogden stated, that the question on the first point arose under the second clause of the second section of the act of congress of 14th July 1832, "to alter and amend the several acts imposing duties on imports." The language of that part of the section, after enumerating a number of articles on which a specific duty is laid, is "and upon merino shawls made of wool, or of which wool is a component part, and on ready-made clothing, fifty per cent. *ad valorem*." In the act, a duty of ten per cent. *ad valorem* is laid "on worsted stuff goods, shawls, and other manufactures of silk and worsted, and on worsted yarn, twenty per cent. *ad valorem*." It is contended, that the

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articles imported by the plaintiff do not come under the provision of the law which imposes a duty of fifty per cent. *ad valorem* on woollen goods ; but that the duty is ten per cent. *ad valorem*, as they are worsted goods, or [140] goods of which worsted is the principal component material. *Congress draws a distinction between worsted and woollen goods. These articles are worsted suspenders, with cotton ends. The shawls are worsted shawls, with cotton borders. Worsted is made of wool, but it undergoes a particular process of carding and combing. It becomes, by the process, "a distinct article." The certificate of the judges states the fact, that although worsted "is made out of wool, by combing, it becomes a distinct article, known in commerce under the denomination of worsted." Congress are to be considered as using terms of art and commercial terms, as they are generally used and generally understood. This has been so decided in this court, in the case of the *United States v. 200 Chests of Tea*, 9 Wheat. 430. The question in that case was, whether certain tea was *bohea* tea. It was proved, that the tea was, in the common language of commerce, called bohea tea ; although it was not in truth so called in the country from which it was brought. If this settles the law of the case, it decides the question in the case before the court ; for the articles upon which the higher duties are claimed, are not "wool" but "worsted," and well known in commerce under this denomination. It will then be for this court to say, on the first point ; whether the articles are wool or worsted.

2. The second point presents the question of the personal responsibility of the collector, on the payment of duties to him which he has illegally exacted. The duties thus demanded were paid by compulsion. Unless paid, the goods would not have been delivered to the owner, and thus this became a compulsory payment. If the duties were not due, their payment gives no right to retain them.

3. The payment of the illegal duties gave the collector no right to them, and the collector cannot discharge himself by paying over the money. 1 Camp. 396. This was a case in which money was illegally claimed by overseers, and was paid over to their successors ; but they were not protected from personal responsibility by the payment. If it was illegally demanded, it was illegally paid over by the collector. But in the point certified, the fact of a notice having been given that the duties were too high charged, is stated ; and the collector was informed that an action would be brought [141] against him to recover back the *amount erroneously paid. It is a general principle of law, that, under such circumstances, the money may be recovered back.

Butler, Attorney-General, for the defendant.—I. On the first point, it is insisted, on the part of the defendant, that the shawls and suspenders were a manufacture of wool, or of which wool was a component part, within the meaning of the words "all other manufactures of wool, or of which wool is a component part," in the second article of the second section of the act of congress of the 14th of July 1832. (4 U. S. Stat. 584.) In support of which view of the subject, the following reasons are suggested, viz :

1. The articles in question do not come within the third article of the section above referred to, and are not manufactures of cotton, or of which cotton is a component part ; and therefore, subject only to a duty of twenty-

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five per cent. *ad valorem*; but as the cotton borders and cotton straps are merely adjuncts or accessories to the shawls and suspenders, the entire article is liable to the rate of duty imposed upon that component part, which is most essential for the formation of the entire article, and is of the greatest intrinsic value.

2. The duties upon the articles in question are, therefore, to be determined solely by the words and intention of the second article of said second section; and as shawls and suspenders are not specifically enumerated, it is respectfully insisted, that they come within the general concluding clause.

3. The tariff act of May 22d, 1824, § 1 (4 U. S. Stat. 25), shows the understanding of congress in their legislation upon the subject, to be, that *worsted* goods are *woollen* goods; else, why except *worsted* goods, *eo nomine*? for if they were not to be deemed *woollen*, they could not be included in a general clause relative to *woollen*, and the exception would be superusage. *Worsted* goods, although made of wool which has undergone a different process, to wit, combing, from wool employed in various other manufactures, are still manufactures of wool. The case admits, that it is wool prepared to a certain state; and until it can be shown that any other raw material, as cotton, flax, &c., is usually manufactured into the intermediate stage denominated *worsted*, then it follows, that *worsted* can have no existence, [*142 except as a manufacture of wool.

4. Whatever weight might, in a case of doubtful construction, be attached to the consideration, that *worsted* being made out of wool by combing, "thereby became a distinct article, well known in commerce under the denomination of *worsted*," no understanding, either of merchants or others, can countervail either the express language of a statute, or the meaning of the legislature, to be derived from the language they have employed. The language and intention of the statute are so explicit as to preclude the admission of extrinsic evidence for settling their interpretation. In *United States v. Clarke*, 5 Mason 32, Judge STORY clearly understands that an article composed of *worsted* is "a fabric of which wool is a component material." *Faw v. Marsteller*, 2 Cranch 23, shows that the general words of a law are not to be restrained by implication, "unless that implication be very clear, necessary, and irresistible." *United States v. Fisher*, 2 Cranch 386: "Where the intent is plain, nothing is left to construction."

5. If congress had intended to discriminate between *woollen* and *worsted*, they would, in some manner, have expressed their intention, either by enumerating all the specific *worsted* articles subject to duty; or by introducing a general clause relative to *worsted*, similar to that respecting *woollen*.

6. It is incumbent on the plaintiff, to show that these goods were expressly excepted, by some special provision of the law, from the operation of the general clause; if no such exception shall be shown, these articles necessarily fall within the general clause, and are subject to a duty of fifty per cent.

7. Shawls and suspenders are not *worsted stuff* goods, within the meaning of the second article; as the term *worsted stuff* goods applies only to articles known in commerce as piece goods, and such as are sold by the yard

II. On the second point, it is insisted on the part of the defendant, that a collector of the customs is *not* personally liable in an action to recover

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back an excess of duties paid to him as collector ; and in the regular ordinary course of his duty, paid into the treasury of the United States ; he, [143] the collector, acting *in good faith, and under instructions from the treasury department, and no protest being made at the time of payment, and no notice not to pay the money over, or intention to sue to recover back the amount paid, given him ; because—

1. No action lies to recover back money paid voluntarily, and without compulsion, where the party receiving the money is not guilty of fraud, and where both parties are equally cognisant of the facts upon which their rights depend. *Gower v. Popkin*, 2 Stark. 85 ; *Fowler v. Shearer*, 7 Mass. 14 ; *Bilbie v. Lumley*, 2 East 469.

2. The collector being merely an agent, no action to recover back money will lie against him, in those cases in which an agent of any other description or character would not be liable.

3. An agent's liability to refund does not extend beyond that of his principal, where the payment has been made directly to him. Therefore, a voluntary and *bond fide* payment to an agent is the same, as regards the rights of the claimant, as if the payment had been made to the principal himself. It is money had and received by the agent to the use of his principal, and not of the party paying it.

4. The money having been received by the collector in good faith, and having been paid over by him to the treasury, in the regular course of his duty, without protest or notice from the plaintiff ; he is not liable to the plaintiff, even admitting that a voluntary and *bond fide* payment to the principal may, under any circumstances, be revoked. *Sadler v. Evans*, 4 Burr. 1985 ; *Buller v. Harrison*, Cowp. 565 ; *Stevenson v. Mortimer*, Ibid. 806.

5. The collector, being a revenue officer, cannot be called on to refund money which he has *bond fide* received in his official capacity ; even if an ordinary agent might, under similar circumstances, be required to refund. An action for money had and received will not lie against a revenue officer for an over-payment. *Whitbread v. Brooksbank*, Cowp. 69.

6. The present action is, in effect, and substantially, an action to try a right ; that is, the right of the United States to claim duties upon certain goods, at a higher rate than admitted by the importer. A question of this nature, so far from being triable *in an action against the agent, can not be introduced in an action for money had and received, wherein the person paying and the principal are the immediate parties. *Lindon v. Hooper*, Cowp. 414 ; *Staplefield v. Yewd*, Bull. N. P. 133 ; *Potter v. Ben-niss*, 1 Johns. 514.

III. On the third point, it is insisted on the part of the defendant, that the collector is not personally liable in an action to recover back an excess of duties paid to him as collector, and by him paid in the regular and ordinary course of his duty into the treasury of the United States, he, the collector, acting in good faith, and under instructions from the treasury department, a notice having been given at the time of payment, that the duties were charged too high, and that the party paying, so paid to get possession of his goods, and intended to sue to recover back the amount erroneously paid, and a notice not to pay over the amount into the treasury. The general propositions presented under the second point are fully applica-

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able to the present ; and it is, therefore, unnecessary to reiterate them, further than as may be necessary to show their applicability to this head.

The additional facts presented by this third point do not vary the result, to which it is respectfully insisted the court must arrive, upon a consideration of the questions arising under the second point. These additional facts do not vary such result, for the following reasons :

1. It was a voluntary payment ; because the party making it was apprised, at the time, of his right to resist or withhold payment ; as the case expressly states, it was, at the time of payment, that notice was given that the duties were charged too high, and that the party paying, so paid to get possession of his goods ; intended to sue to recover back the amount erroneously paid, and gave notice not to pay over the amount into the treasury. *Brown v. McKinney*, 1 Esp. 279 ; *Greenway v. Hurd*, 4 T. R. 553 ; *Fulham v. Down*, 6 Esp. 25 n. ; *Mowatt v. Wright*, 1 Wend. 355.

2. The plaintiff's notice of an intention to sue to recover back the amount erroneously paid, is inconsistent with the previous *part of his notice, as stated in the case, to wit, "that the duties were charged too [*145 high." He was cognisant of all his rights, both in fact and in law, and if, believing he was under no obligation to pay the money, he notwithstanding paid it, it is still a mere voluntary payment ; for which, if he could have no claim against the principal, still less can be demand restitution of the agent.

3. Both parties were acting in good faith, and supposing that they understood their mutual rights. The plaintiff believing that he was not bound to pay duties at the rate demanded, and the collector believing that he was entitled to demand and receive at that rate, the plaintiff notwithstanding pays the demand. All pretence then of ignorance on the one part. of his rights, and of fraud and bad faith on the other, being expressly negatived ; has the plaintiff shown any additional circumstance on which to support his action ? It is merely stated, that "he so paid to get possession of his goods."

4. It is not denied, that an illegal and compulsory payment may be the foundation of an action ; but the payment must be both illegal and compulsory ; admitting, then, that the collector misconstrued the law ; or to speak more correctly, that he applied the law as it had been construed by his official superiors ; yet, in the absence of *mala fides*, it is necessary for the plaintiff to show, fully and satisfactorily, that the payment was compulsory. It is not enough, to allege that he paid the money to get possession of his goods ; but he must show that the immediate possession of the goods was so necessary and urgent as not to admit the delay of a judicial or authoritative decision on the right. *Ashley v. Reynolds*, 2 Str. 916. That a party might protect himself by a replevin, is an answer to an action for money had and received, under threat of a distress for rent. 1 Esp. 84. The circumstance that in this case the plaintiffs had an option to give a bond for the duties, in a suit upon which the validity of the demand could have been put in issue, repels all idea that this was a compulsory payment.

5. Admitting that a party paying money to an agent, under misapprehension, either of fact or law, may, after becoming aware of the mistake, treat the agent as a mere stakeholder, and *suspend the money in his [*146 hands, by a notice not to pay it over ; yet, in this instance, there was

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no notice within the scope and meaning of the rule alluded to. The notice given was simultaneous with the payment ; which was made knowingly and deliberately, and was received fairly and honestly. The contemporaneous notice or protest, therefore, does not render it the less a voluntary payment.

6. Admitting, that a notice given subsequent to payment, would, in the case of an ordinary agent or factor, detain the money in his hands ; the rule does not apply to a ministerial officer of the government, who is bound to pay the money "in the regular and ordinary course of his duty, into the treasury of the United States," and who has actually so paid it. See act March 2d, 1799, § 21. (1 U. S. Stat. 642.) Upon receipt of it by him, he was, as regards the payer, *functus officio*. If he refuses or neglects to pay it into the treasury, the treasury alone can require it of him, and the payer must look to the government for reimbursement.

7. The collector is not an agent or factor, within the usual understanding of the term. He is a mere ministerial officer, bound to receive what the law and the instructions of his superior require him to receive, and bound to pay over, when, in what manner, and to whom, the law and those instructions may direct. The peculiar character of a collector, as different and distinct from that of an ordinary agent, will clearly appear from an examination of the act of March 2d, 1799, § 62, 65. (1 U. S. Stat. 673, 676.) He has no common-law lien, either general or special, upon the funds in his hands. If a collector is liable to an action in a case like this, as well may a suit be brought against a merchant's clerk, who has received money on his master's account, to which the latter was not entitled.

8. Although it is not pretended, that the command of a superior justifies the tort or trespass of his inferior, still, the general policy of the law requires, that ministerial officers, and particularly officers of the revenue, should be protected, where they have acted in good faith, under the instructions of their superior ; especially, in those instances, in which the law itself exacts an implicit obedience to those instructions.

*9. Such also is the general policy of the revenue laws of the ^{*147]} United States ; by which the direction and superintendence of the collection of duties is expressly delegated to the treasury department.

10. If it had been the intention of the plaintiff to resist the payment of duties, he ought, instead of paying the amount at the time, to have given a bond in the usual manner ; and then, in a suit upon the bond, he could have shown that the duties had been improperly liquidated. *Ex parte Davenport*, 6 Pet. 661 ; *United States v. Phelps*, 8 Ibid. 700. As he had an option in this respect, either to pay the duties, or to secure their amount, it follows, that the payment was voluntary ; and there is, therefore, no reason why he should be allowed to litigate in a collateral action, and against a third person, questions which could be directly raised in a direct action between the parties in interest. If the plaintiff's object was to obtain immediate possession of his goods, and if such possession was indispensable, the foregoing consideration negatives all idea that the money was exacted, by taking an undue advantage of his situation.

Ogden, in reply, contended, that the true construction of the act of congress was, that these goods were to pay no more than the lowest duty. These were worsted—worsted stuff goods. The language of the section

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could only be fairly and reasonably so applied. The denomination of worsted, was to be carried on to shawls, so as to read worsted shawls. The article formed by combing the wool, and using it so as to make worsted from it, became essentially different from the original material. It was the change produced by the manufacture, which placed it on the list of articles subjected to lower duty. The result of this process of manufacture was the subject of regulation by congress in another article, and a difference of duty imposed. Woollen yarn is subject to a duty of twenty per cent., while worsted yarn pays four or four and a half per cent. Paper is made from linen; but paper is not linen.

Upon the question of notice, was it necessary to give the collector notice? The collector was bound to know the law; and if by law the goods were not liable to the duty he insisted upon, *he is liable, and can have no right to notice. It appears, that the collector was [*148 instructed to demand the higher duties. While obedience to his instructions might give him a full claim to indemnity on the government, he is not the less responsible to individuals. Such instructions are no protection to him, when he violates the law.

It is said, the case presented is that of a voluntary payment. A voluntary payment, which can be set up to prevent a recovery back of money paid, can only be where all the circumstances are well known to the person paying; and where no constraint exists, and a free and unlimited action is permitted, to make or refuse the payment. But in this case, the duties must be paid or bonds given for them, or the owner could not obtain his goods. He might be entirely ruined by not having the possession of the goods. He may have made contracts for the sale and delivery, the effects of a violation of which would be such as he could not sustain. The case stated in the points certified, is, that the money was paid to get possession of the goods. This was involuntary.

But it is said, the collector was an agent. He is agent of the law, to carry its provisions into effect. He not an agent for any illegal purposes; and he is bound to disregard instructions from the department of the government having charge of the collection of the revenue, if they are contrary to law. If a collector is an agent of the treasury, then he is not an agent of the law of the land. The collector is responsible as a principal, when he compels the payment of duties; and he must answer to an injured individual, for his actions. This is a responsibility from which he cannot escape. A sheriff in levying an execution, is the agent of the plaintiff, but he cannot protect himself by this circumstance. He will not justify his proceedings, by pleading the instructions of another.

It is said, this is a question of the right of the government to compel the payment of duties. It is not such a question; but it is one whether the government has a right to collect excessive duties; whether, under the right to collect and compel the payment of actual duties, too much, more than the law authorizes, shall be exacted. Too much has been paid in this *case, [*149 and therefore, the action for money had and received is proper.

The suggestion that there was another remedy, that of an action of replevin, is not correct. Replevin would not lie. The right of the United States to retain the goods subject to duties, is indisputable; and until this lien is removed, by the payment of the same (although the amount may not

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be certainly ascertained), the lien continues, and assures to the United States the absolute custody of them.

Nor is it admitted, that a bond could have been given. The delivery of a bond would have been an admission that the goods were woollen goods; and thus the plaintiffs would have been estopped from saying they were worsted. Without such a bond, the goods could not have been obtained; which would have been a surrender of the claim in this suit. But two modes of proceeding were presented; either to take the goods, paying the duties claimed, and to institute an action to recover back the excess; or to let them remain in the hands of the collector. Had an action of trover been resorted to, years would elapse before the termination of the suit; and, in the mean time, all the consequences of being kept out of the property would have been sustained. An application to congress for redress might have been attended with the same delay. The laws of the United States prescribe the form of bonds for duties; and although the description of the goods is not inserted in the bond, it is founded on an entry in which they are described; and in this case, the defendant would have required they should be entered as woollen goods.

The *Attorney-General* referred the court to the 62d section of the act of congress for the collection of duties. The provisions of this section, taken in connection with those of the 65th section, provide for the correction of errors in the computation of duties. This court decided in *Davenport's Case*, 6 Pet. 661, that these provisions are to be liberally construed. In 8 Pet. 700, the court decided, that a party was not estopped, by giving a bond, from claiming a reduction or alteration in the computation of the duties.

*THOMPSON, Justice, delivered the opinion of the court.—This is *150] an action of *assumpsit* to recover from the defendant the sum of \$3100.78, received by him for duties, as collector of the port of New York, on an importation of worsted shawls with cotton borders, and worsted suspenders with cotton straps or ends. The duty was levied at the rate of 50 per centum *ad valorem*, under the second article of the second section of the act of the 14th of July 1832, entitled “an act to alter and amend the several acts imposing duties on imports,” as manufactures of wool, or of which wool was a component part. Upon the trial of the cause, it appeared that the shawls imported, and upon which the duty of 50 per centum *ad valorem* had been received, were worsted shawls with cotton borders sewed on; and that the suspenders were worsted with cotton ends or straps. And it appeared in evidence, that worsted was made out of wool, by combing, and thereby became a distinct article, well known in commerce under the denomination of worsted, and upon the trial, the judges were divided in opinion upon the following questions:

1. Whether the said shawls and suspenders were or were not a manufacture of wool, or of which wool was a component part, within the meaning of the words “all other manufactures of wool, or of which wool is a component part,” in the second article of the second section of the act of congress of the 14th of July, in the year 1832?

2. Whether the collector is personally liable in an action to recover back an excess of duties paid to him as collector, and by him, in the regular or ordinary course of his duty, paid into the treasury of the United States;

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he, the collector, acting in good faith, and under instructions from the treasury department; and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount given him?

3. Whether the collector is personally liable in an action to recover back an excess of duties paid to him as collector, and by him paid over, in the regular and ordinary course of his duty, into the treasury of the United States; he, the collector, acting in good faith, and under instructions from the treasury department, a *notice having been given him, at the [*_151 time of payment, that the duties were charged too high, and that the party paying, so paid to get possession of his goods, and intended to sue, to recover back the amount erroneously paid, and a notice not to pay over the amount into the treasury?

I. The act of 1832, in the section under which this question arises, after imposing a specific duty on a number of enumerated articles, concludes in these words: "and upon merino shawls made of wool, all other manufactures of wool, or of which wool is a component part, and on ready-made clothing, 50 per centum *ad valorem*." And the only question under this point is, whether worsted shawls with cotton borders, and worsted suspenders with cotton ends or straps, are manufactures of wool, or of which wool is a component part. It is stated in the point, as a fact, and to be taken in connection with the question, that worsted is made out of wool by combing; but that it becomes thereby a distinct article, well known in commerce under the denomination of worsted.

Laws imposing duties on importations of goods, are intended for practical use and application by men engaged in commerce; and hence it has become a settled rule in the interpretation of statutes of this description, to construe the language adopted by the legislature, and particularly in the denomination of articles, according to the commercial understanding of the terms used. This rule is fully recognised and established by this court, in the case of *Two Hundred Chests of Tea*, reported in 9 Wheat. 438. The court there say, the object of the duty laws is to raise revenue, and for this purpose, to class substances according to the general usage and known denominations of trade. Whether a particular article was designated by one name or another, in the country of its origin; or whether it were a simple or mixed substance, was of no importance, in the view of the legislature. It applied its attention to the description of articles, as they derived their appellations in our own markets, in our domestic as well as our foreign traffic; and it would have been as dangerous as useless, to attempt any other classification than that derived from the actual business of human life. It being admitted, in this case, that worsted is a distinct article, well known in commerce under *that denomination, we must understand congress as using the term in that commercial sense, and as contradistinguished from wool, and woollen goods, and other well-known denominations of goods. The classification of the article in this section, shows that congress had in view a class of goods known as worsted goods, as contradistinguished from wool, and upon which a different duty is laid. A duty of ten per centum *ad valorem* is laid on worsted stuff goods, shawls and other manufactures of silk and worsted, and on worsted yarn, twenty per centum *ad valorem*. If, because worsted is made of wool, all manufactures of

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worsted become woollen manufactures, there would be no propriety in enumerating worsted goods as a distinct class.

Suppose, the shawls, in this case, had been without borders ; they would then have been entirely composed of worsted. It could not, certainly, in such case, be pretended that they were manufactures of wool, if there is any distinction between worsted and wool. Nor would they be a manufacture of which wool is a component part. Such manufactures are, where the article is composed of different materials compounded ; but these shawls, without the borders, would be entirely worsted, and no compound of different materials. And if the shawls, without the borders, would be worsted, and not woollen goods, the addition of a cotton border would not make them woollen. If the border had been wool instead of cotton, it might, with some propriety, be said, that wool was a component part. But adding cotton to worsted, cannot, with any propriety, be said to make the article woollen. The same remarks may be applied to the suspenders ; adding cotton ends or straps to worsted suspenders, cannot make them woollen goods.

This view of the case, would be an answer to the question as put in the point. The court is not called upon to say, what is the duty imposed by the law upon these articles, but only to say whether they are subject to a duty of fifty per centum *ad valorem*, as manufactures of wool, or of which wool is a competent part. But as this question may arise upon the trial, it is proper for the court to express an opinion upon it. The question is, certainly, as it respects the suspenders, not free from difficulty. The language *153] of the act is obscure, and not susceptible of an interpretation entirely satisfactory. There is no part of this section that will cover the goods in question, except that which imposes a duty of ten per centum *ad valorem* on worsted stuff goods, shawls, and other manufactures of silk and worsted. This duty is imposed upon shawls of some description, and none but worsted would at all answer the denomination. Merino shawls, made of wool, are specifically enumerated and made subject to a duty of fifty per centum. The clause imposing the duty on worsteds may well admit of reading "worsted stuff goods and worsted shawls;" they are certainly not a manufacture of worsted and silk. It might be a proper subject of inquiry upon the trial, whether shawls of this description are usually denominated worsted shawls in the market, and if so, the rule of construction alluded to, would apply to the case. At all events, the answer to be given to the question as put, must be, that the shawls and suspenders are not a manufacture of wool, or of which wool is a component part.

II. The case put in the second point, is, where the collector has received the money in the ordinary and regular course of his duty, and has paid it over into the treasury, and no objection made at the time of payment, or at any time before the money was paid over to the United States. The manner in which the question is here put, presents the case of a purely voluntary payment, without objection or notice not to pay over the money, or any declaration made to the collector of an intention to prosecute him to recover back the money. It is, therefore, to be considered as a voluntary payment, by mutual mistake of law ; and in such case, no action will lie to recover back the money. The construction of the law is open to both parties, and each presumed to know it. Any instruction from the treasury department could not change the law, nor affect the rights of the plaintiff.

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He was not bound to take and adopt that construction; he was at liberty to judge for himself and act accordingly. These instructions from the treasury seem to be thrown into the question, for the purpose of showing, beyond all doubt, that the collector acted in good faith. To make the collector answerable, after he paid over the money, without any intimation having been given that the duty was not legally charged, cannot be sustained, *upon any sound principles of policy or law. There can be no hardship in requiring the party to give notice to the collector that he [*_154 considers the duty claimed illegal, and put him on his guard, by requiring him not to pay over the money. The collector would then be placed in a situation to claim indemnity from the government. But if the party is entirely silent, and no intimation of an intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the government to indemnify him against a suit. It is no sufficient answer to this, that the party cannot sue the United States. The case put in the question, is one where no suit would lie at all. It is the case of a voluntary payment, under a mistake of law, and the money paid over into the treasury; and if any redress is to be had, it must be by application to the favor of the government, and not on the ground of a legal right.

The case of *Morgan v. Palmer*, 2 Barn. & Cres. 729, was an action for money had and received, to recover back money paid for a certain license; and one objection to sustaining the action was, that it was a voluntary payment. The court did not consider it a voluntary payment, and sustained the action; but Chief Justice ABBOTT, and the whole court, admitted, that the objection would have been fatal, if well founded in point of fact. The court said, it had been well argued, that the payment having been voluntary, it could not be recovered back in an action for money had and received. And in *Brisbain v. Dacres*, 5 Taunt. 154, the question is very fully examined by GIBBS, Justice, and most of the cases noticed and commented upon, and with the concurrence of the whole court, except CHAMBRE, Justice, lays down the doctrine broadly, that where a man demands money of another, as matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum of money voluntarily, he cannot recover it back. It may be, says the judge, that, upon a further view, he may form a different opinion of the law; and it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, many inconveniences may arise. There are many doubtful questions of law. When they arise, the defendant has an option either to litigate the question, or submit to the demand and pay the money. But *it would be most mischievous and unjust, if he who has acquiesced in the right, by such [*_155 voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money. This doctrine is peculiarly applicable to a case where the money has been paid over to the public treasury, as in the question now under consideration. Lord ELDON, in the case of *Bromley v. Holland*, 7 Ves. 23, approves the doctrine, and says it is a sound principle, that a voluntary payment is not recoverable back. In *Cox v. Prentice*, 3 Maule & Selw. 348, Lord ELLENBOROUGH says, I take it to be clear, that an agent who receives money for his principal, is liable, as a principal, so long as he stands in his original situation, and until

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there has been a change of circumstances, by his having paid over the money to his principal, or done something equivalent to it. And in *Buller v. Harrison*, Cowp. 568, Lord MANSFIELD says, the law is clear, that if an agent pay over money, which has been paid to him by mistake, he does no wrong, and the plaintiff must call on the principal; that if, after the payment has been made, and before the money has been paid over, the mistake is corrected, the agent cannot afterwards pay it over, without making himself personally liable. Here, then, is the true distinction: when the money is paid voluntarily, and by mistake, to the agent, and he has paid it over to the principal, he cannot be made personally responsible; but if, before paying it over, he is apprised of the mistake, and required not to pay it over, he is personally liable. The principle laid down by Lord ELLENBOROUGH, in *Townsend v. Wilson*, 1 Camp. 396, cited and relied upon on the part of the plaintiff, does not apply to this case. He says, if a person gets money into his hands illegally, he cannot discharge himself, by paying it over to another: but the payment, in that case, was not voluntary; for, says Lord ELLENBOROUGH, the plaintiff had been arrested, and was under duress when he paid the money. In *Stevenson v. Mortimer*, Cowp. 816, Lord MANSFIELD lays down the general principle, that if money is paid to a known agent, and an action is brought against the agent for the money, it is an answer to such action, that he has paid it over to his principal. That he intended, however, to apply this rule to cases of voluntary payments made by *mistake, is evident from what fell from him in *Sadler v. Evans*, 4 *156] Burr. 1986. He there said, he kept clear of all payments to third persons, but where it is to a known agent; in which case, the action ought to be brought against the principal, unless in special cases, as under notice, or *mala fides*: which seems to be an admission that, if notice is given to the agent, before the money is paid over, such payment will not exonerate the agent. And this is a sound distinction, and applies to the two questions put in the second and third points in the case now before the court. In the former, the payment over is supposed to be without notice; and in the latter, after notice and a request not to pay over the money. The answer, then, to the second question is, that under the facts there stated, the collector is not personally liable.

III. The case put by the third point, is, where, at the time of payment, notice is given to the collector, that the duties are charged too high, and that the party paying, so paid to get possession of his goods; and accompanied by a declaration to the collector, that he intended to sue him to recover back the amount erroneously paid, and notice given to him not to pay it over to the treasury. This question must be answered in the affirmative, unless the broad proposition can be maintained, that no action will lie against a collector to recover back an excess of duties paid him, but that recourse must be had to the government for redress. Such a principle would be carrying an exemption to a public officer beyond any protection, sanctioned by any principles of law or sound public policy. The case of *Irving v. Wilson and another* (4 T. R. 485) was an action for money had and received, against custom-house officers, to recover back money paid to obtain the release and discharge of goods seized, that were not liable to seizure; and the action was sustained. Lord KENYON observed, that the revenue laws ought not to be made the means of oppressing the subject; that the seizure was illegal;

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that the defendants took the money under circumstances which could by no possibility justify them ; and therefore, this could not be called a voluntary payment.

The case of *Greenway v. Hurd* (4 T. R. 554) was an action against an excise officer, to recover back duties illegally *received ; and Lord KENYON does say, that an action for money had and received will not [^{*157} lie against a known agent, but the party must resort to the superior. But this was evidently considered a case of voluntary payment ; the plaintiff had once refused to pay, but afterwards paid the money ; and this circumstance is expressly referred to by BULLER, Justice, as fixing the character of the payment. He says, though the plaintiff had once objected to pay the money ; he seemed afterwards to waive the objection, by paying it. And Lord KENYON considered the case as falling within the principle of *Sadler v. Evans*, 4 Burr. 1984, which has already been noticed. In the case of *Snowden v. Davis*, 1 Taunt. 358, it was decided, that an action for money had and received would lie against a bailiff, to recover back money paid through compulsion, under color of process, by an excess of authority, although the money had been paid over. The court say, the money was paid to the plaintiff, under the threat of a distress ; and although paid over to the sheriff, and by him into the exchequer, the action well lies ; the plaintiff paid it under terror of process, to redeem his goods, and not with intent, that it should be paid over to any one. The case of *Ripley v. Gelston*, 9 Johns. 201, was a suit against a collector to recover back a sum of money demanded by him for the clearance of a vessel. The plaintiff objected to the payment, as being illegal, but paid it, for the purpose of obtaining the clearance, and the money had been paid by the collector into the branch bank, to the credit of the treasurer. The defence was put on the ground that the money had been paid over, but this was held insufficient. The money, say the court, was demanded as a condition of the clearance ; and that being established, the plaintiff is entitled to recover it back, without showing any notice not to pay it over. The cases which exempt an agent do not apply ; the money was paid by compulsion ; it was extorted as a condition of giving a clearance, and not with intent or purpose to be paid over. In the case of *Clinton v. Strong*, 9 Johns. 370, the action was to recover back certain costs, which the marshal had demanded, on delivering up a vessel which had been seized, which costs the court considered illegal ; and one of the questions was, whether the payment was voluntary. The court said, the payment could *not be voluntary ; the costs were exacted by the officer, *colore officii*, as a condition of the redelivery of the property ; [^{*158} and that it would lead to the greatest abuse, to hold that a payment, under such circumstances, was a voluntary payment, precluding the party from contesting it afterwards. The case of *Hearsey v. Pruyne*, 7 Johns. 179, was an action to recover back toll which had been illegally demanded ; and SPENCER, Justice, in delivering the opinion of the court, says, the law is well settled, that an action may be sustained against an agent, who has received money to which the principal had no right, if the agent has had notice not to pay it over. And in the case of *Fry v. Lockwood*, 4 Cow. 456, the court adopts the principle, that when money is paid to an agent, for the purpose of being paid over to his principal, and is actually paid over, no suit will lie against the agent to recover it back. But the distinction taken in the

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case of *Ripley v. Gelston*, is recognised and adopted ; that the cases which exempt an agent, when the money is paid over to his principal without notice, do not apply to cases where the money is paid by compulsion, or extorted as a condition, &c. From this view of the cases, it may be assumed as the settled doctrine of the law, that where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility, by paying it over to his principal, if he has had notice not to pay it over. The answer, therefore, to the third point must be, that the collector is personally liable to an action to recover back an excess of duties paid to him as collector, under the circumstances stated in the point ; although he may have paid over the money into the treasury.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of New York, and on the questions on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel : On consideration whereof, it is the opinion of this court, *159] on the first question, that the said shawls and suspenders were *not a manufacture of wool, or of which wool is a component part, within the meaning of the words "all other manufactures of wool, or of which wool is a component part," in the second article of the second section of the act of congress of 14th July 1832. On the second question, it is the opinion of this court, that, under the facts as stated in the said second question, the collector is not personally liable. On the third question, it is the opinion of this court, that the collector, under the circumstances as stated in the said question, is liable to an action to recover back an excess of duties paid to him as collector, although he may have paid over the money into the treasury. Whereupon, it is ordered and adjudged by this court to be so certified to the said circuit court of the United States for the southern district of New York.

*160] *JOHN HOGAN, Plaintiff in error, v. THOMAS J. FOISON.

Appellate jurisdiction.—Amount in controversy.—Burden of proof.

The *onus probandi* of the amount in controversy, to establish the jurisdiction in a case brought before the court by writ of error, is upon the party seeking to obtain a revision of the case ; he may prove that the value exceeds \$2000, exclusive of costs. In this case, the matter in question is the ownership of one negro woman and two children, who are slaves, and it is not supposed their value can be equal to that sum. The writ of error was dismissed.

ERROR to the District Court for the Southern District of Alabama.

This case was argued by *Coze*, for the plaintiff in error ; and by *Key*, for the defendant. After the argument, the court, on inspecting the record, became satisfied that the amount in controversy between the parties was not sufficient to give the plaintiff a right to bring the case up by a writ of error.

STORY, Justice, delivered the opinion of the court.—The court are not satisfied, that this case is within their appellate jurisdiction. To support

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that jurisdiction, it is necessary that it should appear upon the face of the record, or upon affidavits to be filed by the parties, that the sum or value in controversy exceeds \$2000, exclusive of costs. The *onus probandi* is upon the party seeking to obtain a revision of the case, to establish the jurisdiction. Here, the whole matter in controversy is the ownership of one negro woman and two children, who are slaves; and it is not supposed, that their value can be equal to \$2000. The bond in the case, in the nature of a forthcoming bond, in a larger penalty, does not vary the result. But the plaintiff in error is at liberty to establish, if necessary, that the value exceeds that sum. But there are other cases on the docket, between the plaintiff in error and other persons, which involve the same points which have been argued in this case. If any of these cases involve a sum or value, which entitles the court to take jurisdiction, we will hereafter give an opinion upon those points.

Writ of error dismissed.

*WILLIAM C. S. VENTRESS *et. al.* Executors of LOVIO VENTRESS, [**161 deceased, Plaintiffs in error, *v.* NEAL SMITH, Administrator of JOHN CLARK, deceased.

Powers of executors.—Sales.

The power to sue for debts due to the estate of an intestate is implied in the authority given to administrators *ad colligendum*, issued under the authority of the statute law of Mississippi. Construction of the statute of Mississippi providing for the substitution of executors or administrators, when either party to a suit dies before judgment.

It is incumbent on a plaintiff in error to make out an alleged error, clearly and satisfactorily; every reasonable intendment should be in favor of a judgment of a court.

The administrator, in Alabama, had sold slaves belonging to the estate of the intestate, without an order of court, authorizing the sale; and by private sale. The statute of Alabama declares, that it shall not be lawful for any executor or administrator to dispose of the estate of any testator or intestate, at private sale, except where the same is directed by the will of the testator; but that, in all cases where it may be necessary to sell the whole, or any part of the personal estate, application must be made to the orphans' court for an order of sale, which sale is required to be at public auction, after giving notice thereof as pointed out by the statute. The sale of these negroes, although *bond fide* and for a valuable consideration, was not made according to the provisions of this law; it was a private sale, and made without any order from the court; the order of sale expressly excepts the negroes. The sale was, then, not only without authority, but in express violation of the provisions of the statute; such a sale cannot be supported, upon any principles of law.

Executors and administrators, in making sales of property, must comply strictly with the requisites of all statutory provisions on the subject; and unless every essential direction of the law is complied with, all whose interests are affected by the authority to sell are not concluded by the sale, unless, from a long acquiescence, a foundation is laid for a fair and reasonable presumption, that the requisites of the law had been complied with; no such presumption can arise in this case. It is a general rule of law, that a sale by a person who has no right to sell, is not valid against the rightful owner.

Authority given to executors and administrators to sell, is a personal trust, and must be strictly pursued; and if they transcend their authority, in any essential particular, their act is void. It has sometimes been contended, that a *bond fide* purchase for a valuable consideration, and without notice, was equivalent to a purchase in market-overt, under the English law, and bound the property against the party who had right. But we are not aware, that this Saxon institution of markets-overt, which controls and interferes with the application of the common law, has ever been recognised in any of the United States, or received any judicial sanction; at all events, no local usage or custom has been shown, applicable to the present case, to take it out of the general principle of the law of sales.

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*ERROR to the District Court of Mississippi. John Clark, of the state of Alabama, died in 1818, owning and possessed of certain slaves; and after his decease, administration of his estate was granted to his widow. She afterwards intermarried with John Farrington, and an inventory of the estate was filed, the slaves being included in the same. On the first day of November 1819, Neal Smith, and his co-surety for the administratrix, by an application to the proper court, had the letters of administration revoked, on the ground, that the administratrix and her husband were embezzling the estate of John Clark; and they stated that the negroes had been sold. Administration was granted to Neal Smith. The slaves were carried from the state of Alabama to the state of Mississippi, and were there sold. The county court of Clark county, in the state of Alabama, in August 1819, authorized the administratrix of John Clark to sell all the personal property of the intestate, except the slaves; and it did not appear, that any order to sell the slaves had ever been obtained. Neal Smith, some time after he had been appointed administrator of the estate of John Clark, in Alabama, procured letters of administration, *ad colligendum*, from the probate court of Wilkinson county, in the state of Mississippi. They were in the following terms:

"State of Mississippi, Wilkinson county. To all to whom these presents shall come, greeting: Know ye, that whereas, John Clark, of Clark county, in the state of Alabama, as it is said, had, at his decease, personal property within this state, the administration whereof cannot immediately be granted, but which, if speedy care be not taken, may be lost, destroyed or diminished; to the end, therefore, that the same may be preserved for those who shall appear to have a legal right or interest therein, we do hereby request and authorize Neal Smith to secure and collect the said property, wheresoever the same may be, in this state, or in Wilkinson county, whether it be goods, chattels, debts or credits, and to make, or cause to be made, a true and perfect inventory thereof, and to exhibit the same, with all convenient speed, together with a reasonable *account of his collection, in the [163] office of the register of the orphans' court of the county of Wilkinson. Witness, the Honorable Thomas H. Prosper, judge of probates of Wilkinson county.

[No seal of office.]

C. C. West, Reg. W. C. P."

Neal Smith, under the authority of the letters of administration *ad colligendum*, on the 5th day of April 1822, instituted, in the district court of the United States for Mississippi, an action of trover against Lovic Ventress, for the recovery of the slaves which had belonged to his intestate; and with the declaration in trover, a copy of the letters of administration *ad colligendum* was filed. The defendant appeared and pleaded to the suit, and it was continued to April term 1823, when the death of the defendant was suggested, the case continued, and a *scire facias* was issued to Elizabeth Ventress, his administratrix. The administratrix appeared, by her attorney, at the succeeding October term, and the cause was "legally continued" until April term 1825; when the death of the administratrix was suggested, and the cause again continued. On the 21st day of February 1827, a *scire facias* was issued to William C. S. Ventress and others, the plaintiffs in error, executors of the last will and testament of Lovic Ventress, and at January term of the district court, they appeared,

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and the case was tried by a jury ; and a verdict was rendered in favor of the plaintiff, on which judgment was entered by the district court.

On the trial, the defendant offered no evidence other than a bill of sale for the slaves, made by James McDonald to Lovic Ventress, in consideration of \$1900 ; with proof that the same was paid at the time of sale, and that it was deemed a fair value for the slaves.

The plaintiffs offered in evidence the deposition of Neil McNair, and the defendant objected to the admission of a part of the same. The court overruled the objection, and the following bill of exceptions was sealed :

"On the trial of this cause, the plaintiff offered in evidence the deposition of Neil McNair, the answer of which witness to the 10th cross-interrogatory—(10th cross-interrogatory : Were they not sent away, or intrusted to some person, to be removed *and sold, by the administrator or administratrix, or other personal representative of said [*164 John Clark, in the state of Alabama? Answer : Deponent saith, that he hath reason to believe, and doth believe, that the negroes were removed and sold, not by the authority or request of the administratrix or any other person representing said estate)—the defendants, by their counsel, objected to as evidence to the jury, on the ground of being inadmissible from the manner of its answer, and moved the court to rule it out as inadmissible testimony. But the court overruled the application of the defendant's counsel, and permitted the said answer to be read to the jury as evidence in the cause."

Upon the submission of the cause to the jury, the plaintiff's counsel requested the court to charge the jury—1. That it must appear in evidence to the jury, that Abigail Clark was authorized, by an order of the court in Alabama, to sell the slaves, or she could convey no legal title to the defendant. 2. That it must also appear by evidence to the jury, that James McDonald was authorized, either by legal purchase, or by a power from the administratrix, to sell the slaves, or his conveyance could not divest the estate of Clark of the legal title in his representatives. 3. That unless both of the above facts appeared, to wit, the authority of the administratrix to sell, and the authority of McDonald, either by a legal purchase or power of attorney from the administratrix, that the title to the slaves still remained in the legal representatives of John Clark, deceased. 4. That if the plaintiffs were entitled to recover, they were entitled to the value of the hire of the slaves, by way of damages, from the time the slaves came into the possession of Ventress.

The defendants' counsel also presented the court with the following points in writing, which they requested the court to give in charge to the jury :

1. That if the jury shall believe, from the evidence before them, that Abigail Clark became the administratrix of the estate of John Clark, deceased, in the state of Alabama, and as such administratrix, held and possessed the slaves sued for, till her intermarriage with John Farrington, and that said Farrington and wife, in virtue of the administration of said Abigail, were also *possessed of the slaves sued for ; and that the possession [*165 of these defendants, or their testator, of the slaves sued for, was acquired, by, through or from the said Farrington and wife, either directly or indirectly ; then the plaintiff, as administrator to collect the estate of

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John Clark, deceased, has no right to recover in this action against these defendants.

2. Will charge the jury—if they shall believe, from the evidence, that the slaves sued for in this action were, since the death of said John Clark, held and possessed by Abigail Clark, his administratrix, in the state of Alabama, and that during her administration, she intermarried with John Farrington, and that Farrington and wife, possessing said slaves, by virtue of the administration of said Abigail, elogned, wasted, embezzled, sold or otherwise converted or disposed of them, in violation of their duties as administrators of said Clark's estate, by which *devastavit* of said administrators, the slaves sued for passed to the possession of one James McDonald, who brought them to this state and sold them for a full and *bond fide* consideration, to Lovic Ventress, defendants' testator, who purchased in good faith, and without notice of such *devastavit* of said administrator; then the testator, Lovic Ventress, acquired a good title as against the plaintiff, and the verdict should be for the defendants.

3. Will charge the jury—that if they believe, from the evidence, the slaves sued for belonged to the estate of John Clark, deceased, at the time of his death, and passed into the possession of his administrators, in the state of Alabama, who embezzled and disposed of the same, in disregard of their duties as administrators; but that defendants' testator, Lovic Ventress, became an innocent purchaser of said slaves (in this state), for a valuable consideration, without notice of the maladministration of said Clark's estate in Alabama; then they should find their verdict for the defendants.

The court refused to instruct the jury on all or either of the several points, as sought for and requested by the defendants' counsel, as aforesaid; but did charge the jury as requested by the plaintiff, except upon the fourth point; on which the court was of opinion, that hire, as damages, could be recovered only from the commencement of the suit.

*The counsel of the defendants excepted to the opinion of the court, in charging as requested by the counsel for the plaintiff, and refusing to charge the jury as requested by them, on behalf of the defendants. The defendants prosecuted this writ of error.

The case was argued by Jones, for the plaintiffs; and by Key, for the defendant in error.

Jones, for the plaintiff, maintained—1. That the letters *ad colligendum* from the court of probates in Mississippi vested not in the plaintiff below, but in terms excluded, any title to the possession of, or to maintain any possessory action for the property in question, under the peculiar circumstances and relations of that property and of these parties; even if a good title were shown in the legal representatives of Clark, in Alabama. 2. That the process of the suit in the record shows a discontinuance and a mistrial. 3. That the evidence excepted to by defendants, in the first bill of exceptions, and admitted by the court, was inadmissible. 4. That the right of Ventress (defendants' testator) by purchase, *bond fide*, for a valuable and full consideration, without any notice of breach of trust or other fraud in the vendors, who had possession and the right of possession, clothed with a legal title; a purchase consummated long before the second letters of administration granted to the plaintiff in Alabama, and his letters *ad colligendum*

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in Mississippi, and whilst the original letters of administration, granted to the vendor in Alabama, stood unrevoked and in full force, was valid and indefeasible ; consequently, that the several opinions and instructions, both those delivered and those rejected by the court below, and both affirmatively and negatively disparaging that title, and sustaining the plaintiffs' title, were erroneous.

Upon the first point, Mr. Jones cited Stat. Edward III., c. 11 ; Lord Coke's Commentaries on the Stat. of Edw. III., 2 Inst. 397-8 ; Stat. 4 Edw. III.; 31 Edw. III.; 1 Com. Dig., Adm. E. 13; 2 *Doug. 545; 1 H. Bl. [*167 184; 1 Bos. & Pul. 330; 1 Maule & Selw. 409.

Upon the 4th point, Mr. Jones cited 4 T. R. 625, 621; 1 Bos. & Pul. 293; 7 Ves. 152; 8 Ibid. 209; Williams on Executors and Administrators, 1 vol. p. 303.

Key, for the defendant in error, contended, that the testimony objected to in the first exception, was properly admitted. The instruction prayed for by the appellee was properly given ; and those asked by appellant properly refused. He cited 1 Williams on Executors and Administrators, 333, 609, 611 ; Statutes of Mississippi, 281 ; Walker 386 ; Holt 484 ; 1 Paine 400 ; 2 Wheat. 263 ; 1 Rand. 195 ; 3 Munf. 194 ; Laws of Alabama (Toulmin's Digest) 334, Act of 1809.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up from the district court of the district of Mississippi, upon a writ of error. It is an action of detinue, to recover five negro slaves, of which John Clark, deceased, was the owner. The plaintiff in the court below prosecuted as administrator *ad colligendum*, under letters of administration granted by the judge of probate of Wilkinson county, in the state of Mississippi. The action appears, by the record, to have been commenced in the year 1832, against Lovic Ventress ; and after the case was at issue, and before trial, Lovic Ventress died, and a *scire facias*, tested the first Monday in April 1823, was issued against Elizabeth Ventress, administratrix, &c., who afterwards appeared in court, and the cause, as is stated upon the record, was legally continued. At a subsequent term of the court, the cause being legally continued, as is alleged, the death of the defendant, Elizabeth Ventress, the administratrix, was suggested and admitted to be true ; and thereupon, a *scire facias* was issued to the present defendants in the court below, as executors of Lovic Vendress, tested the first Monday in October 1826, and due service thereof upon the defendants was returned. The record then states, that afterwards, in January term 1834, to which term the cause was regularly continued by consent, the *parties appeared by [*168 their attorneys, and the cause was tried, and a verdict found for the plaintiff. Upon the trial, two bills of exception were taken. One in relation to the admissibility of evidence, and the other upon instructions given by the court to the jury, upon the merits of the case ; which will be noticed hereafter.

It will be necessary, in the first place, to dispose of two objections, arising upon the record, which have been raised against the plaintiff's right to maintain the present action : 1. That the letters of administration *ad colligendum*, granted by the court of probates in Mississippi, did not vest in the plaintiff any right or title to the possession of the property in question,

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or authorize him to maintain an action to recover it, even if a good title was shown in the legal representatives of John Clark in Alabama. 2. That the record shows a discontinuance of the cause, and a mistrial.

I. It may be proper to observe, with respect to the first of these exceptions, that as it rests upon the disability of the plaintiff to sue, it ought to have been pleaded in abatement; but as we think the objection untenable, in whatever form it is raised, we shall proceed to notice it in the manner in which it is now presented. These letters of administration recite, that John Clark, of Clark county, in the state of Alabama, as it is said, had, at his decease, personal property within this state, the administration whereof cannot be immediately granted, but which, if speedy care be not taken, may be lost, destroyed or diminished; to the end, therefore, that the same may be preserved for those who shall appear to have a legal right or interest therein, we do hereby request and authorize Neal Smith to secure and collect the said property, wheresoever the same may be, in this state, or in Wilkinson county, whether it be goods, chattels, debts or credits, and to make a true and perfect inventory thereof, &c. These letters of administration were granted upon the authority of an act of the legislature of Mississippi (Laws of Mississippi 281), which empowers the chief justice of the orphans' court, in the county in which such justice resides, whenever he may deem it necessary, to appoint an administrator to collect together the goods of the deceased, for the purpose of depositing *them in the hands of the chief justice; out of which he shall pay [169] the debts of the deceased, and be liable, in law, as other administrators. The argument at the bar is, that the power given to the administrator, does not authorize him to bring a suit. That no such power is expressly given, nor is it implied in the power to collect. The words of the statute are general, to collect together the goods of the deceased. The power vested in the magistrate to appoint such administrator, is discretionary, whenever he may deem it necessary. And if the words of the act, upon any reasonable interpretation, will admit of a construction which will uphold the authority given by the letters of administration, they ought not to be so construed as to impute to the magistrate an unauthorized exercise of power. And if we look to the letters of administration, the power to sue is necessarily implied in the language there used: "We do hereby authorize the said Neal Smith to secure and collect the said property, whether it be goods, chattels, debts or credits," &c. These words are amply sufficient to authorize the bringing of suits, if necessary for the purpose of executing the power, and is certainly no forced interpretation of the word collect, as used in the statute, to consider it as implying the authority to bring suits. In the case of *Irwin and Wright v. Peak*, Walker 386, decided in the supreme court of Mississippi, in the year 1831, it was held, that an administrator *ad colligendum*, may bring suits. This power, however, in the view of the court, rested upon a statute referred to in the opinion, but which has not been produced on the argument of this case. But the decision is so recent, and referring expressly to the statute, we think we may safely rely upon it as an authority to sustain the right to sue, under the power given by the letters of administration in this case. And we the more readily adopt this conclusion, because we think the right to sue is necessarily implied in the authority to collect the goods, chattels, rights and credits.

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The grant of the power carries with it all the usual, ordinary and necessary means to effectuate the beneficial exercise of the power.

II. The proceedings, as stated upon the record, to continue the cause, appear to have been in conformity to a statute of that state (Mississippi Statutes 238), which provides, that, when any *suit shall be depending in any court, and either of the parties shall die before judgment, [*170 the executors or administrators of the deceased, in case the cause of action by law survives, shall have full power to prosecute or defend such action ; and the court is authorized and required to render judgment for or against the executor or administrator, as the case may require ; and a *scire facias* is authorized to be issued to call in the executor or administrator to make himself a party ; and such was the course adopted in the present case, as appears from the record. Upon the death of Lovic Ventress, a *scire facias* issued to Elizabeth Ventress, the administratrix, who appeared and became a party to the suit, and the cause was continued ; and upon the death of the administratrix, another *scire facias* issued, to call in the defendants, the executors of Lovic Ventress, who appeared and became parties to the suit, which, according to the record, was regularly continued, by consent, to the term of the court when the cause was tried. For what reason, or under what circumstances, Elizabeth Ventress was appointed administratrix of Lovic Ventress, when the defendants were his executors, does not appear. But the court will not intend that it was without authority. Circumstances may readily be supposed to have existed, that would require the appointment of an administration for some special purpose. Whether she was a general administratrix, or only one with limited powers, for some special purpose, does not appear. But when the record states that the cause was regularly continued, by consent of the present parties, who were fully competent to give such consent, there can be no ground upon which this court can now consider the cause discontinued.

III. The next objection arises upon a bill of exceptions taken at the trial, relative to the admission of evidence. The plaintiff offered in evidence the deposition of Neal McNair, and the objection arises upon the answer to the tenth cross-interrogatory, which is as follows : " Were they not sent away, or intrusted to some person, to be removed and sold by the administrator or administratrix, or other personal representative of John Clark, in the state of Alabama ? " Answer : " Deponent saith, he has reason to believe and doth believe, that the said *negroes were [*171 removed and sold, not by the authority or request of the administratrix or any other person representing said estate." This answer was objected to on the part of the defendant, but admitted by the court, to be read to the jury. The whole deposition is not set out in the bill of exceptions ; and this question and the answer, standing alone, unconnected with the antecedent and subsequent interrogatories and answers, are in a great measure unintelligible. The very form of the interrogatory, shows the question to have had relation to some antecedent inquiry, and is vague and indefinite. " Were they not sent away, or intrusted to some person (naming no one), to be removed and sold by the administrator or administratrix, or other personal representative of John Clark." It seemed to be a fishing inquiry, that would hardly admit of a direct and positive answer. Had it been a direct question to some specific fact, the belief of the witness would

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be no legal answer. The belief of a witness is a conclusion from facts. The witness should state facts, and the conclusion to be drawn from them, rests with the jury. Although this answer, standing alone, may not be strictly admissible; yet, when connected with other facts of the deposition, it might not be objectionable. Subsequent inquiries might have drawn from the witness the facts upon which his belief was founded; and all being submitted to the jury, the belief of the witness might be, at least, rendered harmless. It does not appear how or under what authority this deposition was taken, or whether the parties were present or not. If they were, and no objection was made to the answer, it ought to be considered a waiver; and the exception not allowed at the trial. It is incumbent on the plaintiff to make out the error clearly and satisfactorily; every reasonable intention should be in favor of the judgment; and we think the exception too vague to justify a reversal of the judgment.

IV. This second bill of exceptions embrace the merits of the case, and turns upon the validity of the purchase of the slaves by Lovic Ventress in his lifetime. The facts upon which the court was called upon to instruct the jury on this question, are briefly these: The slaves in controversy were the property of John Clark, *of Alabama, and in his possession, at [172] the time of his death, in the year 1818. His widow, Abigail Clark, was appointed administratrix of his estate, and in May 1819, intermarried with John Farrington, and in June 1819, filed an inventory of John Clark's estate, including therein the slaves in question. On the first of November of the same year, the letters of administration to her were revoked, and administration granted to Neal Smith, the present plaintiff, in the court below. In August 1819, the county court of Clark county, in the state of Alabama, authorized Abigail Farrington, the administratrix of John Clark, to sell all the personal property of John Clark, except the negroes; and it does not appear, that any order of sale of the slaves of John Clark had been obtained. The defendants offered no other evidence of title to the slaves than a bill of sale from James McDonald to the defendants' testator, in Wilkinson county, in the state of Mississippi, dated November 2d, 1819, for the consideration of \$1900, which was paid at the time of sale, and which was deemed a full and fair value of the slaves. Upon this evidence, the plaintiffs' counsel requested the court to charge the jury—1. That it must appear in evidence to the jury, that Abigail Clark was authorized by an order of the court of Alabama, to sell the slaves, or she could convey no legal title to them. 2. That it must also appear by evidence to the jury, that James McDonald was authorized, either by a legal purchase, or by a power from the administratrix, to sell the slaves, or his conveyance could not divest the estate of Clark of the legal title in his representatives. 3. That, unless both of the above facts appeared, to wit, the authority of the administratrix to sell, and the authority of McDonald, either by a legal purchase, or power of attorney from the administratrix, the title to the slaves still remained in the legal representatives of John Clark. These instructions the court gave. A fourth was requested, which the court refused to give, and which it is unnecessary here to notice.

The defendants' counsel also requested the court to instruct the jury upon certain points, substantially as follows: 1. That if they believe, [173] from the evidence, that Abigail Clark *became the administratrix

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of John Clark, deceased, and, as such, held possession of the slaves in question, and that after her intermarriage with John Farrington, she and her husband were in possession of them, and that the possession of the slaves by the defendants or their testator, was acquired directly or indirectly from or through Farrington and his wife, then the plaintiff, as administrator to collect the estate of John Clark, has no right to recover in this action against the defendants. 2. If they believe from the evidence, that Farrington and his wife, so possessing the slaves by virtue of the administration aforesaid, had wasted, embezzled, sold or otherwise converted the slaves, in violation of their duty as administrators, by which *devastavit* the slaves passed to the possession of one James McDonald, who brought them to the state of Mississippi, and sold them to Lovic Ventress, the defendants' testator, for a full and valuable consideration, and that he purchased them *bond fide*, without notice of such *devastavit*, then Lovic Ventress acquired a good title, as against the plaintiff, and the verdict should be for the defendants. 3. That if they believed, that the slaves belonged to the estate of John Clark, and passed into the possession of his administrators, who embezzled and disposed of them, in disregard of their duty as administrators, but the defendants' testator, Lovic Ventress, became an innocent purchaser of the slaves, for a valuable consideration, without notice of the mal-administration of said Clark's estate in Alabama, then they should find a verdict for the defendant. These instructions the court refused to give.

It is unnecessary to notice separately the several instructions prayed by the parties, respectively. The general question arising under them, and one which lies at the foundation of the action, relates to the sale of the negroes by Abigail Clark, the administratrix of John Clark. The several instructions prayed on the part of the plaintiff and given by the court, assume, that in order to divest the plaintiff of the right to recover, as the present administrator of John Clark, it must be shown, that his first administratrix had authority to sell the slaves by an order of the court in Alabama; and that James McDonald was authorized, either by purchase from the administratrix, or by authority from her, to sell the slaves, *in order to divest the [*174 representatives of Clark of the title, and take from the plaintiff the right to recover. The principle assumed in the instructions asked on the part of the defendants, is, that the administratrix of Clark being in possession of the slaves, and that possession having passed directly or indirectly to the defendants, the plaintiff, as administrator *ad colligendum* of John Clark, cannot recover in this action. And that admitting the administratrix had, by her conduct with respect to the slaves, committed a *devastavit*; yet, if the defendants' testator purchased them *bond fide*, and for a valuable consideration, without notice of such *devastavit*, he acquired a good title to the slaves, and the plaintiff had no right to recover. It may be observed here, that the case is entirely silent in the statement of the evidence with respect to notice by the defendants' testator, of the situation of these slaves. The instruction prayed, however, was subject to the decision of the jury upon that point; and we assume, in the consideration of the case, that Lovic Ventress was a *bond fide* purchaser, without notice, and rest the question entirely upon the want of authority in the administratrix of Clark to sell the slaves.

It may be observed, in the first place, that the letters of administration

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to her were revoked, before the sale to the defendants' testator. The revocation was on the first of November 1819, and the bill of sale bears date on the day after. There may be some mistake, however, in this, and we place no reliance upon it; as the want of authority in the administratrix is clearly established on other grounds. The statute of Alabama (Laws Ala. p. 334) declares, that it shall not be lawful for any executor or administrator to dispose of the estate of any testator or intestate, at private sale, except where the same is directed by the will of the testator; but that in all cases where it may be necessary to sell the whole or any part of the personal estate, application must be made to the orphans' court, for an order of sale, which sale is required to be at public auction, after giving notice thereof as pointed out by the statute. The sale of these negroes, although *bond fide* and for a valuable consideration, was not made according to the provisions of this law. It was a private sale, and made without any order from the court; the order of sale expressly excepts the negroes. The sale was then not only without *authority, but in express violation of the provisions of the *175] statute. Such a sale cannot be supported upon any principles of law. In the case of the *Executors of Emos v. James* (4 Munf. 194), it was held by the court of appeals of Virginia, that the sale of a slave belonging to the estate of the testator, by a person named in the will as one of the executors, but who, at the time of the sale, had not qualified or given the bond required by a statute of that state, was void against the executor who had qualified, although the sale was *bond fide* and for a valuable consideration. It was admitted, that if the question was to be decided upon the principles of the common law, without regard to the act of assembly, the sale would have been valid, the power of the executor being derived from the will. But he not having qualified and complied with the statute, by giving the bond required, the foundation of his authority was done away; and all his acts were invalid, and the sale illegal and void. The present is a much stronger case. The want of authority in the executor to sell in that case, rested upon the construction of the statute; influenced, in some measure, by the policy which governed its enactment. But in the present case, the sale was against the express exception in the order of sale, and in violation of the positive prohibition in the statute to sell at private sale. The law in this class of cases is well settled; that executors and administrators, in making sales of property, must comply strictly with the requisites of all statutory provisions on the subject; and that, unless every essential direction of the law is complied with, all whose interests are affected by the authority to sell are not concluded by the sale (7 Mass. 488), unless, from a long acquiescence, a foundation is laid for a fair and reasonable presumption, that the requisites of the law had been complied with. No such presumption can arise in this case. It is a general rule of law, that a sale by a person who has no right to sell, is not valid against the rightful owner. Authority given to executors and administrators to sell, is a personal trust and must be strictly pursued; and if they transcend their authority in any essential particular, their act is void. 4 Johns. Ch. 368; 6 Conn. 387. It was a maxim of the civil law, that *nemo plus juris in alium transferre potest, quam ipse habet*; and this is *176] a plain dictate of common sense. *It was also a principle of the English common law, that, a sale out of market-overt, did not change the property from the rightful owner; and the custom of the city of London,

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which forms an exception to the general rule, has always been regarded and restricted by the courts with great care and vigilance, that all such sales should be brought strictly within the custom. Com. Dig. tit. Market, E. It has sometimes been contended, that a *bond fide* purchase for a valuable consideration and without notice, was equivalent to a purchase in market-overt, under the English law, and bound the property against the party who had right. 1 Johns. 478. But we are not aware, that this Saxon institution of markets-overt, which controls and interferes with the application of the common law, has ever been recognised in any of the United States, or received any judicial sanction. At all events, no local usage or custom has been shown, applicable to the present case, to take it out of the general principles of the law of sales. And although the defendants' testator was a *bond fide* purchaser, for a valuable consideration, and without notice, the sale being without authority and against law, he acquired no title that will bind the property against the party who has right. The judgment of the court below must accordingly be affirmed, with costs.

THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the district of Mississippi, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs, and damages, at the rate of six per centum per annum upon the sum adjudged by the said district court, to the plaintiff in this court, in case the said plaintiff cannot have the said negro slaves delivered to him.

*SARAH BOONE and others, Appellants, *v.* WILLIAM CHILES and [**177
others, Appellees.

Bond fide purchaser.—Merger.—Allegata et probata.—Champerty and maintenance.—Constructive trust.

The complainants filed a bill in the circuit court of Kentucky, claiming a conveyance of the legal title, and an account of rents and profits, of a tract of land, the legal title to which was derived, in virtue of the law of Virginia, under a settlement and a pre-emption right, held by Reuben Searey. Searey gave his bond to Hoy, to make a deed of one-half of the land to which he was thus entitled ; the other half having been given by him to one Martin, to obtain the location and patenting ; he afterwards gave the plats and surveys to Hoy, who, in 1785, obtained a patent for the land, which he was to have a deed for ; Hoy, in 1781, assigned the bond of Searey to George Boone, and made himself surety for its performance ; and George Boone assigned the bond to Thomas Boone, the ancestor of the complainants. Thomas Boone lived in the state of Pennsylvania, and was in Kentucky in 1802, 1810 and 1819, in the neighborhood of the land ; but while there, he took no measures, personally, to obtain the title or possession of it ; in 1787, he gave to George Boone a power of attorney to obtain a conveyance of the land ; and in 1802, he made a conditional sale of it to Hezekiah Boone ; but the condition was not performed by Hezekiah Boone ; so that, under the agreement, he obtained no right to the land. Possession was taken of parts of the land, and improvements made as early as, or before, 1806, and the persons in possession were among the defendants. George Boone exceeded his powers, and made agreements to sell the land ; and also agreed to give up to one of the heirs of Hoy, Searey's bond ; and some of the heirs sold parts of the land to the persons in possession, asserting a right to the legal title ; and another of the heirs sold, by a quit-claim deed, all her rights, as one of the heirs of Hoy, to Green Clay. Afterwards, William Chiles, alleging that he had obtained from George Boone, and from Hezekiah Boone, the conditional purchaser, the equitable right of Thomas Boone, under Searey's bond, filed in the

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name of Thomas, George and Hezekiah Boone, and in his own name, in the county court of Bourdon county, a bill against the heirs of Hoy, the persons in possession and against Green Clay, alleging him to be a purchaser, with notice of Thomas Boone's equitable title under Searcy and Hoy; and obtained from that court a decree for a conveyance to him of the legal title, and afterwards a deed for the same, from a commissioner appointed to execute the same; this decree was afterwards, on appeal, reversed for informality; but before the same was reversed, the complainants filed this bill, asking for a conveyance from Chiles of all the title he held in the land, either under the decree, or in any other manner. Chiles, after the bill was filed, purchased from Green Clay the rights he held; and, in his answer, alleged him to have been an innocent purchaser, without notice; the persons in possession, who purchased from Chiles, after the decree of the Bourbon court, answered, asserting their possession, and that they were protected by the statute of limitation; and submitted to such rules and regulations, according to law and equity, as the case might require. In 1822, Thomas Boone made an agreement with Boon Engles, by which the latter took upon him the institution and conducting of this suit, for a portion of the benefit to be derived from it; and this the per-

*178] sons in possession "allege to be champerty. The court decreed a conveyance by Chiles, and by others who held the legal title, to be made to the complainants, of all the lands unsold, and not in the possession of others; and that those who were in possession, who had purchased from Chiles, should pay to the complainants the sums which they had agreed to pay, respectively, with interest, according to their respective contracts.

A court of equity must be regardless of all its rules, before it can recognise Chiles as a purchaser, or as having any right whatever in the land: it must also forfeit its character, if it sanctions such a course of iniquitous fraud. We deem it wholly useless to contrast the relative equities of the plaintiffs and Chiles, in order to affirm their right for a decree for the conveyance of the legal title, obtained in violation of every principle which governs courts of equity; unless he has made out some objections to the relief prayed, on grounds unconnected with the justice of the case.

The heirs of Searcy are not parties; they had no interest in the land; their father's bond was satisfied by the performance of the condition, when the patents were obtained by Hoy; who, by purchase from Martin and Searcy, held the legal title to the whole 1400 acres, subject to be divested only by the equity of Boone, derived by this agreement to transfer the one-half; no act, therefore, remained to be performed by the heirs of Searcy. The title of Boone became complete, by the union of his equitable with Hoy's legal title, without any interposition of the heirs of Searcy, who had no interest to defend, or title to convey.

The lapse of time and the staleness of the plaintiffs' equity, is also set up as a bar to a decree in their favor; but whatever effect time may have in equity in favor of a possession long and peaceably held, it can have none in favor of Chiles, whose only claim is under the equity of Thomas Boone, and against whom the present suit was brought in six years after he first interfered with it. It cannot be permitted to him to acquire the legal title of Hoy, in virtue of Boone's equity, and to hold it to his own use, on the ground, that Boone's right had become extinct by the lapse of time, before he acquired it. The means by which the legal title has been conveyed to Chiles, have affected his conscience too deeply with fraud, for a court of equity to suffer him to enjoy its fruits: as to him, the plaintiffs have established a right to a decree for the conveyance of whatever title he may have derived by any conveyance to himself directly, of the legal right of Hoy's heirs.

By the rules of the appellate court, it can act on no evidence which was not before the court below, nor receive any paper that was not used at the hearing.

A party is not allowed to state one case in a bill or answer, and make out a different one by proof; the *allegata* and *probata* must agree; the latter must support the former.

A purchaser with notice may protect himself under a purchaser by deed without notice; but cannot do it by purchase from one who holds or claims by contract only; the cases are wholly distinct. In the former, the purchaser with notice is protected; in the latter, he has no standing in equity, for an obvious reason—that the plaintiffs' elder equity shall prevail, unless the defendant can shelter himself under the legal title, acquired by one whose conscience was not affected with fraud or notice, and who can impart his immunity to a guilty purchaser, as the representative of his legal rights, fairly acquired by deed, in such a manner as exempts him from the jurisdiction of court of equity; such a purchase affixes no stain on the conscience, and equity cannot disturb the legal title. But as it does not pass by a contract of purchase, without deed, the defendant can acquire only an equity; the transfer of which does not absolve him from the consequences of his first fraudulent purchase; his second purchase of an equity

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will not avail him more than the first; "for the original notice of the plaintiffs' equity taints his conscience, so as to make him a mere trustee, if he hold the legal title from one who is not an innocent, *bond fide* purchaser."

It is a general principle in courts of equity, that where both parties claim by an equitable title, the one who is prior in time is deemed the better in right; and that where the equities are equal in point of merit, the law prevails.

Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser, who has put himself in peril, by purchasing a title, and paying a valuable consideration, without notice of any defect in it: and when, in addition, he shows a legal title from one seised and possessed of the property purchased, he has a right to demand protection and relief, which a court of equity imparts liberally. Such suitors are its most especial favorites; it will not inquire how he may have obtained a statute, mortgage, incumbrance, or even a satisfied legal term, by which he can defend himself at law, if outstanding; equity will not aid his adversary it taking from him the *tabula in naufragio*, if acquired before a decree; relief will not be granted against him, in favor of the widow or orphan; nor shall the heir see the title-papers; it is a bar to a bill to perpetuate testimony, or for discovery; and goes to the jurisdiction of the court, over him; his conscience being clear, any adversary must be left to his remedy at law.

But this will not be done on mere averment or allegation; the protection of such *bond fide* purchase, is necessary only when the plaintiff has a prior equity; which can be barred or avoided only by the union of the legal title with an equity, arising from the payment of the money, and receiving the conveyance, without notice, and a clear conscience.

In setting up a *bond fide* purchase, without notice, by plea or answer, it must state the deed of purchase, the date, parties and contents briefly; that the vendor was seised in fee, and in possession, the consideration must be stated, with a distinct averment that it was *bond fide* and truly paid, independently of the recital in the deed; notice must be denied, previous to, and down to the time of paying the money, and the delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to, from which notice can be inferred; and the answer or plea must show how the grantor acquired title. The title purchased must be, apparently, perfect, good at law, a vested estate in fee-simple; it must be a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. Such is the case which must be stated to give the defendant the benefit of an answer or plea of an innocent purchase without notice; the case stated must be made out; evidence will not be permitted to be given of any other matter not set out.

The objections of the plaintiffs' recovery, on the ground of the contract between Thomas Boone and Boon Engles being within the statutes of champerty and maintenance, cannot be sustained, for two reasons: 1. The English statutes on this subject, which were adopted in Kentucky, punished the offence, and declared the contract for maintenance void between the parties, but did not direct or authorize the dismissal of the suit instituted between other parties in furtherance of such contract; Boon Engles is no party to this suit; and it does not concern the defendants, whether it was commenced and is conducted by his agency, or by the plaintiffs themselves; the right of the plaintiffs is not forfeited by such an agreement, and it may be asserted against the defendants, whether the contract with Boon Engles is valid or void. 2. By the act of Kentucky of 1798, which was in force when this contract was made, and suit brought, no person could be prevented from prosecuting or defending any claim "to land, held under [*180 the land laws of Virginia; nor was any suit brought to make good such claim considered as coming within the provisions of the common law, or any statute against champerty or maintenance; these statutes were not revived till 1824.

Time does not bar a direct trust, as between trustee and *cestui que trust*, till it is disavowed; yet, where a constructive trust is made out in equity, time protects the trustee, though his conduct was originally fraudulent, and his purchase would have been repudiated for fraud. So, where a party takes possession in his own right, and was *prima facie* owner, and is turned into a trustee by matter of evidence merely; and where one, intending to purchase the entire interest in the land, takes a conveyance, without words of limitation to his heirs, passing only an estate for life, the lapse of fourteen years after the expiration of the life-estate, is a protection to the heirs of the purchaser.¹

¹ It is well settled, that the statute of limitations runs against a constructive trust. Walker v. Walker, 16 S. & R. 379; Christy v. Sill, 95 Penn. St. 380; Hayman v. Keally, 8 Or. O. C. 825; Ex parte O'Neale, 6 Bank. Reg. 426.

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What that reasonable time is, within which a constructive trust can be enforced, depends on the circumstances of the case;¹ but there can be few cases where it can be done, after twenty years' peaceable possession, by the person who claims in his own right, but whose acts have made him a trustee by implication; his possession entitles him to, at least, the same protection as that of a direct trustee, who, to the plaintiffs' knowledge, disavows the trust and holds adversely; as to whom the time runs from the disavowal, because his possession is thenceforth adverse. The possession of land is notice of a claim to it by the possessor; if not taken and held by contract or purchase, it is, from its inception, adverse to all the world; and in twenty years, bars the owner, in law and in equity; a purchaser in possession by a contract to sell, is, in law, a trespasser; but in equity, he is the owner of the estate, having taken possession under the contract; and the vendor is in the situation of an equitable mortgagor. If the entry was by purchase, and the purchaser claims the land in fee, he is not a trustee; his title, though derivative from, and consistent with, the original title of the plaintiff, is a present claim, in exclusion of, and adverse to it; a vendee in fee, derives his title from the vendor; but his title, though derivative, is adverse to that of the vendor: he enters and holds for himself. Such was the doctrine of this court in *Blight v. Rochester*, 7 Wheat. 548; in that case, the court said, "the vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor."

Equity makes the vendor, without deed, a trustee to the vendee, for the conveyance of the title; the vendee is a trustee for the payment of the purchase-money, and the performance of the terms of the purchase; but a vendee is, in no case, a trustee of the vendor, as to the possession of the property sold; the vendee claims and holds it in his own right, for his own benefit, subject to no right of the vendor, save the terms which the contract imposes; his possession is therefore, adverse as to the property, but friendly as to the performance of the conditions of the purchase.

APPEAL from the Circuit Court of Kentucky. The principal facts of this case were the following:

Reuben Searcy, being entitled to a settlement of 400 acres of land, and a pre-emption of 1000 acres, in Bourbon county, Kentucky, under the laws of Virginia, obtained a *certificate thereof from the commissioners, and [181] employed one John Martin to perfect the title to the lands, and gave him one-half of the same for so doing. On the 24th September 1781, Searcy sold 700 acres, supposed to be one-half of the land, to William Hoy, and executed a bond to Hoy. The bond was in the following words:

"Know all men by these presents, that I, Reuben Searcy, of the county of Fayette, am held and firmly bound unto William Hoy, of the county of Lincoln, and state of Virginia, in the penal sum of 50,000*l.*, current money of Virginia, to which payment, well and truly to be made, I bind myself, my heirs, executors and administrators, unto the said William Hoy, he, his heirs or assigns, this 24th day of September 1781. The condition of the above is such, that if the above-bound Reuben Searcy shall well and truly make, or cause to be made, as soon as deeds are made to lands in this county in general, a good and sufficient deed for 700 acres of first-rate land, lying in Fayette county, on Licking creek, between John Martin's station and Ruddle's station; it being part of a settlement and pre-emption, that John Martin cleared out on the halves, for said Reuben Searcy; and the said Hoy takes his first choice of the land; then the above obligation to be void; otherwise to remain and be in full force and virtue."

On the 15th of December, 1781, William Hoy made the following assignment to George Boone of this bond, by an indorsement thereon: "I, William Hoy, assign over the within bond unto George Boone, his heirs or

¹ Within what time a constructive trust will be barred, must depend on the circumstances of the case; and these are always examinable. *Michaud v. Girod*, 4 How. 503.

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assigns ; and said Hey obliges himself, his heirs, executors and administrators, as *shourety* to within bond ; and if the within lands cannot be obtained, by reason of a prior claim, then and in that case, 700 acres, equal in quality and convenience, shall discharge the within bond."

Searcy also assigned the plats and certificates of survey to Hoy, who was thus enabled, in July 1785, to complete the title, by obtaining patents for the land, in his own name. On the 30th of April 1785, George Boone made the following assignment of the bond to Thomas Boone, the ancestor of the appellants, who are his heirs : * "I do hereby assign over all [*182 my right, title, and claim of the within bond unto Thomas Boone, heirs or assigns, without recourse to the same ; that is to say, that I, the said George Boone, am no ways obligated, if the said William Hoy or his heirs, sufficient to make good the within bond ; but if the said William Hoy or his heirs, should not be good, then I, George Boone, do bind myself, my heirs, to make good the same unto the said Thomas Boone, or his heirs or assigns."

On the 25th day of January 1823, Thomas Boone filed a bill in the circuit court of the United States for the district of Kentucky, stating his equitable right, thus derived, to 700 acres of land, part of the settlement and pre-emption of Searcy, alleging that he had never parted with the same ; but admitting that he made a conditional contract with Hezekiah Boone for it, which was never complied with by said Hezekiah, and was afterwards expressly abandoned by him.

On the 1st of October 1787, Thomas Boone, who resided in the state of Pennsylvania, gave to George Boone a power of attorney, in the following terms : "Know all men by these presents, that I, Thomas Boone, of Oly township, in the county of Berks, and commonwealth of Pennsylvania, blacksmith, for divers good causes me hereunto moving, hath constituted and appointed, and by these presents do constitute and appoint, my trusty friend, George Boone, of Madison county, in the settlement of Kentucky and commonwealth of Virginia, yeoman, my true and lawful attorney, for me and in my name, and to my use, to ask, demand, sue for and recover of and from Major William Hoy, of Kentucky settlement, a deed or other lawful conveyance, valid in law, for seven hundred acres of land, in or near the waters of Hinkson and Stoner, branches of Licking river ; it being one-half or a moiety of a settlement or pre-emption right, belonging to a certain Reuben Searcy, and which I purchased from Squire Boone, who purchased the same from said George Boone, who purchased the same from said William Hoy ; hereby giving and granting my sole power and authority to my said attorney concerning the premises, to do or cause to be done therein, as amply as I myself might or could do, were I personally present ; and on the obtaining said title and *conveyance for me, and in my name, sufficient [*183 discharges to sign, seal and deliver and one or more attorney or attorneys under him to substitute and appoint ; and at pleasure to revoke, hereby ratifying and confirming whatsoever my said attorney shall lawfully do concerning the premises. In witness whereof, I have hereunto set my hand and seal, this 1st day of October 1787."

The bill charged that William Chiles instituted a suit in the Bourbon circuit court of Kentucky, without the knowledge or consent of Thomas Boone, in the name of Thomas Boone, William Chiles, Hezekiah and George

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Boone, against the heirs of William Hoy, and against others in possession of the land, to compel the execution of a conveyance of the 700 acres of land ; that in the suit, Chiles, alleging the execution of the bond by Searcy, and the assignments before stated, pretended that under the conditional contract between Thomas and Hezekiah Boone, the latter had become entitled to the land, and that he purchased it from said Hezekiah. In the suit, a decree was pronounced for a conveyance to be made to Chiles ; and on the 7th day of January 1822, a commissioner, appointed by the court, according to the laws of Kentucky, executed a conveyance to Chiles for 700 acres of the land, in conformity with the decree. In the proceedings in the Bourbon court, William Chiles made Green Clay a defendant, alleging him to be a purchaser from Newland and wife, of two-eighths of the land, he having notice of Thomas Boone's rights. The wife of Newland was one of Hoy's heirs. After the decree, he purchased from Green Clay all he held under Newland and wife ; and, in this case, he relied on the title obtained under that purchase. Hezekiah Boone, by his answer, asserted a right to the land under the conditional contract, but no proof of a compliance with the same was given in the cause ; and it was in evidence, that, long after the contract, he acknowledged he had no right to the land, and that it belonged to Thomas Boone.

Some of the defendants in the circuit court alleged, that George Boone, as attorney in fact for Thomas Boone, in August 1792, assigned Searcy's bond to a certain John South, and delivered the bond to him. John South *184] was the executor of William Hoy, *and had married one of his daughters ; and South sold to some of the defendants, parts of the land, under a pretence that he held Hoy's claim : and they insisted that the assignment of Searcy's bond should inure to their benefit. It was in evidence, that William Chiles, after the death of John South, applied to Benjamin South, who had the custody of Searcy's bond, and by an arrangement with him, the assignment to John South was erased and cancelled, and the bond was transferred to Chiles. This was prior to the institution of the suit in the Bourbon county court, and the bond was filed among the proceedings in the cause.

The defendants also set up, by way of defence, that an agreement in writing, of which a copy was filed, was made between Thomas Boone and Boon Engles, in December 1822, by which Engles undertook, at his own expense, to prosecute a suit for the 700 acres of land in dispute ; and, as a consideration for his trouble, &c., was to have one half of the land. This suit, they alleged, was prosecuted under that agreement ; and they charged, that it was, therefore, a case of champerty and maintenance, forbidden by law ; and in which the court could give no relief. The complainants replied, that at the time of the agreement, the law of champerty and maintenance was not in force in Kentucky ; and that, if it was, this case did not fall within its scope.

During the pendency of this suit in the circuit court of Kentucky, the defendants, in the suit in the Bourbon circuit court, instituted, as aforesaid, in the name of Chiles and the Boones, prosecuted a writ of error from the court of appeals of Kentucky, to reverse the decree, obtained in that suit. And the court of appeals, accordingly, did reverse the decree, for want of proper parties ; and remanded the cause to the Bourbon circuit court for

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further proceedings. The cause was still pending there ; Chiles and the heirs of Thomas Boone respectively claiming a right to direct its future prosecution. By amended pleadings, the complainants alleged the reversal of the decree of the Bourbon county court ; and the heirs of George Boone were made defendants. They also alleged that the heirs of George Boone asserted no claim to the land ; and that Searcy was dead, having left no heirs known to the complainants.

*During the proceedings in the circuit court, and in this situation of the same, a question of jurisdiction arose ; and the judges being [*185 divided in opinion, the cause was adjourned, according to law, to the supreme court, with the following statement of the points respecting which the judges were divided in opinion : " 1. The court being then divided, and the judges opposed in opinion as to the jurisdiction over the case ; and unable, therefore, to render a decree on the merits, they resolve to adjourn that question to the supreme court, to wit, under all circumstances, appearing as above can this court entertain cognisance of the case ? 2. The judges were also opposed in opinion on the point whether the complainants were entitled to a decree, in the absence of any proof that the persons made defendants in the amended bill, as heirs of George Boone, were in fact his heirs ? "

The cause came on, upon this adjournment of it, before the supreme court, at the January term 1834 ; and this court, in its mandate to the Kentucky circuit court, certified its opinion on the questions submitted to it as follows : "The court is of opinion : 1. That, under the circumstances stated in the certificate of the judges, the said circuit court could entertain cognisance of the case. 2. That the want of proof that the persons made defendants in the amended bill, as the heirs of George Boone, were, in fact, his heirs, is no obstruction to a decree on the merits of the cause."

It appeared on the record, that William Chiles, besides the conveyance executed to him by the commissioner appointed by the Bourbon circuit court, of the interest of all the heirs of Hoy, obtained a special conveyance, prior to the institution of the Bourbon suit, from William Hoy, the son, and his wife, and John Sappington and Pathenia his wife, who were two of the heirs of William Hoy, the obligor. And in Chiles's bill, filed in the circuit court of Bourbon, he charged G. Clay to have obtained the interest of Newland and wife, as one of the heirs of W. Hoy, with full notice of his (Chiles's) claim ; in other words, with full notice of the claim of Thomas Boone's heirs : and that he, G. Clay, upon receiving a conveyance from them, bound himself by special contract to make good all the contracts of their ancestor.

Green Clay filed his answer to the bill of Chiles and others, *in [*186 the Bourbon circuit court ; in which answer, he did not allege that he had obtained the legal title from Newland and wife ; he did not allege, that he had obtained any title from them, but referred to a *contract* by which he acquired their interest, and, without producing it, referred to it as being of record. The heirs of John South, of George Boone, and of Hezekiah Boone, were made defendants, and most of them answered ; but the complainants alleged, they were only formal parties.

One object of the suit was, to annul the contract between Hezekiah Boone and Thomas Boone ; but the main purpose of it was, to obtain the legal title to and possession of the 700 acres of land in contest, which was vested in W. Chiles and the heirs of W. Hoy, and which Chiles, as was

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alleged, fraudulently acquired ; first, by possessing himself of the bond of R. Searcy, the property of Thomas Boone ; and secondly, by prosecuting the suit in chancery in the Bourbon circuit court, in the name of Thomas Boone and others ; and lastly, by obtaining conveyances from two of the heirs of Hoy, and from Green Clay.

Upon the return of the cause to the circuit court, in May 1834, that court pronounced a final decree, by which the defendant, Chiles, was decreed, by deed of release, with special warranty, to convey to the complainant all his title and interest in the land in controversy, except that which he held under a deed from Green Clay, who, the court stated, was a purchaser for a valuable consideration from Newland and wife (she being one of the heirs or devisees of W. Hoy, in whom the legal title was), and who conveyed to Chiles the title which he (Clay) had so acquired. The court also decreed, that Chiles should deliver to the clerk of the court, to be cancelled, the contract between him and Hezekiah Boone and George Boone, as attorneys in fact for Thomas Boone, as it appeared to the court, that the contract was made without authority, and that its terms had never been complied with by Hezekiah Boone. The court further decreed (having previously caused an adjustment to be made of one-half of the rents and profits of the land, and one-half of the value of the improvements) the tenants in possession to pay the several balances which appeared to be due from them. As to so much of the land as was claimed by John Evalt, one of the defendants, within the *bounds of Flournoy's patent, and which ^{*187]} was described in the decree ; the court dismissed the bill, as Evalt, and those under whom he claimed, had more than twenty years' adverse possession. The court further decreed, that the claim of the complainants was not to be prejudiced by the decree in this cause, as to any of the heirs of Hoy, who were not parties to the suit. The court likewise decreed, that Jones Hoy, and Fanny, by her guardian *ad litem*, should convey all their interest, &c., in the land, as heirs or devisees of William Hoy. And finally, the court directed the clerk, as commissioner, to convey, in default of conveyances being made by the defendants, according to the statute of Kentucky; and possession to be delivered by a fixed day. From this decree, both parties appealed, and entered into the requisite bonds for the due prosecution of their respective appeals.

The case was argued, at January term 1835, by *Clay*, for the appellants ; and by *Harding*, for the appellees ; and the court, after advisement, ordered a re-argument. It was now, again, argued by *Clay* and *Crittenden*, for the appellants ; by *Underwood*, for William Chiles ; and by *Hardin*, for the other defendants.

Before the argument was commenced, Mr. Underwood stated, that he was desirous to submit a preliminary question, which was, whether a certain deed from John Newland and wife to Green Clay, a certified copy of which would be filed among the records of the court, would be admitted as part of the proceedings of the case in the circuit court ? If this was refused, he would move for a *certiorari* to the circuit court, in order to bring up the same.

Mr. Clay stated, that the deed had not been exhibited in the circuit court, on the hearing of the case. The final decree of the circuit court,

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from which this appeal was prosecuted, was returned at May term 1834. The paper now offered purports to be a copy of a deed which the clerk of the circuit court, on the 3d day of June 1835, certifies was produced to the court, by the counsel of the defendants; who "suggested that the same deed was on file," and "used on the hearing of the cause;" and that on the said *3d day of June 1835, was, by the court, ordered to be copied and [*188 certified to the supreme court. He was willing that the copy of the deed should be considered as if the deed were before the court on a return to a *certiorari*. As he denied that the deed had been used in the circuit court, he would not admit its use in this court; nor did the certificate of the clerk show that the deed had been before the circuit court, on the hearing of the cause. It was agreed by the counsel, that the copy of the deed should be considered as if it had been sent up from the circuit court on a *certiorari*.

Clay, for the appellants, said, that it would be contended, the decree of the circuit court was erroneous—1. In decreeing, in behalf of William Chiles, upon the conveyance of Green Clay to him, of the interest of Newland and his wife, who was one of the heirs of William Hoy. Neither Green Clay, in his answer to the bill in the Bourbon court, nor Chiles, as his alienee, in his answer in the federal court, makes those allegations which entitle Clay or Chiles to the protection accorded to them, of a *bona fide* purchaser without notice. There is no allegation or proof, as to what sum was paid, nor when or how it was paid, by Clay, to Newland and wife. He does not deny the allegation of the bill, that he (Clay) purchased under a stipulation to make good the contract of the ancestor of Newland and wife, William Hoy. He does not exhibit any legal title whatever (and none is believed to exist) from Newland and wife to him. And there is much reason to believe, that his own quit-claim title to Chiles, was made to avoid the suit which Chiles was prosecuting against him, in virtue of the title-papers of Thomas Boone. A purchaser, to be protected, must show that he has paid a fair consideration, and what it was; and obtained the legal title, before he had notice of the equity. Clay and Chiles have utterly failed to establish these indispensable requisites; and Chiles himself, in the Bourbon bill, charged Clay to be a *mala fide* purchaser. 2. The court below erred in dismissing the bill as to Evalt, and ought to have decreed against him. 3. That the court is also believed to have erred in limiting the *decree [*189 to one-half the amount of the rents and profits. It ought to have decreed to the complainants the whole amount of the rents and profits upon the land in contest; or, at least, a greater proportion thereof than that of one-half.

He would examine the case : 1. As it respects the heirs of William Hoy. 2. As to the rights and duties of William Chiles. 3. As it respects the rights and claims of the tenants in possession.

I. This is the common case of an application to chancery, to oblige the holder of the legal title to convey to the holder of a superior equitable title. As to Hoy's heirs, the only ground set up for them is the length of time since the execution of the bond and the transfer of the same. No one of the parties can present, or did offer, a solid objection to the title. In considering this objection, it will be proper for the court to look at the terms of

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Searcy's bond, and to those of the assignment. It is not an agreement to make a conveyance at once ; but "as soon as deeds were made for lands in the country in general."

In estimating time on an instrument, it is proper to look to the condition for the period and circumstances in which its obligation is to be performed. In this case, the provision is important, for the state of the country, and the difficulties of conflicting titles created great delays. The deed was to be made after all these difficulties should cease ; there is, therefore, in the bond, no definite time for the execution of the contract it contains. But the obligor disqualified himself from executing the contract in the bond ; for he assigned the evidences of title, and the deed was to be made, when Martin had perfected the rights of Searcy. William Hoy died shortly afterwards, within four or five years, leaving infant heirs ; some of whom did not arrive at age until 1809. This suit was commenced fourteen years afterwards. There is evidence on the record, to show that the infancy of Hoy's heirs was the cause of the delay. The evidence proves, that South, the executor of William Hoy, postponed the delivery of the title. It is also contended, that the *190] obligor was bound to give notice, when he was ready to make the title. He may be hastened by the obligor ; but if the time was vague and indefinite, and depending, as in this case, on circumstances which he only, or he best, knew ; he shall not avail himself of the lapse of time, unless he gives notice.

As the patents issued to another, he should have given notice ; and as to the interfering claims within the survey, there are suits to this day ; non-residence—application for title—infancy—the acts of South ; all these show, that if the dispute was with Hoy's heirs only, this court could, without hesitation, give the relief asked by the appellants. But others are interested in the controversy, who claim under a title derived from some of the heirs of Hoy. The answers of Hoy's heirs show, that they themselves make no claim ; and the appellants are resisted by strangers, claiming for them.

II. As to the condition of William Chiles, and on the question whether there is anything in his situation which can authorize him to resist the claims of the appellants : He claims under the ancestor of the appellants, and under proceedings founded on his right. He was not in possession, and never was in possession ; and he instituted the proceedings in the Bourbon county court, obtained a legal title, fraudulently ; and he now refuses to give up that title to the appellants.

A very important question is presented under the commissioner's deed. A. fraudulently procures, by proceedings in the right of B., a title to be made to him, founded on that right, and obtains a conveyance in his own name. By the laws of Kentucky, no title can be derived but by deed or last will. A deed under the decree of a court is not the end of a suit, but it is the means to obtain a title. At the time when, by the decree of the Bourbon court, Chiles obtained the conveyance, the proceedings of the appellants in the circuit court of the United States were instituted. The decree of the Bourbon court was afterwards reversed, and the question is, whether proceedings of another court, subsequent to the institution of this suit, and when Chiles held a title under the decree of that court, could affect, or in *191] any manner impair or alter, the jurisdiction of this court over the case, as it stood when the proceedings were commenced ? The *proceed-

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ings of the inferior court need not be looked into. The title under the decree remains in Chiles, and will so remain, until divested by a deed or last will. It can thus be regarded by this court; and a conveyance of his title, under the order of the court, will give a title to the complainants. This view of the case is sustained by analogies in the law. Sales of personal property under the decree of a court, afterwards reversed, are valid; and even a purchase made by a complainant, under a decree in his own case, subsequently revoked, will stand. Whatever is done by a competent court, while its decrees are in force, is binding on the whole world. The court may, in its discretion, order differently. The Bourbon court did not know the fraud of Chiles on the complainants. It had no application before them for a reconveyance, on which an order for the same could be made.

But if, by any proceedings subsequent to the conveyance to Chiles, under the decree of the Bourbon court, the operation of the same has been impaired or affected; yet this court should order that all the title held by Chiles should be conveyed to the complainants. It is contended by him, that, independent of the right which Chiles derived under the proceedings of the Bourbon court, he has one-eighth part of the land purchased from Newland and wife by Green Clay, and conveyed by him to Chiles. The wife of Newland was one of the children of William Hoy. The conveyance of Newland and wife to Green Clay was only by a quit-claim deed; and there is no evidence of his having paid anything for it. Chiles, in the proceedings in the Bourbon court, makes Green Clay a defendant, and charges him as a purchaser with notice. Neither Clay nor Newland assert that a deed was made, but only a contract. No possession was delivered, and no money was paid. Newland and wife say, they never conveyed a title by deed to Clay.

For the first time, a deed to Clay is produced, as if sent up under a *certiiorari* to the circuit court. The counsel of Chiles, after the appeal to this court, went into the circuit court, and suggested that the deed had been produced on the hearing of the cause; and he now asks that it shall be considered by this court. It is *for this court to decide, what effect [*192 shall be given to it. Its admission to any consideration, is opposed. The only paper regularly in the record is a quit-claim deed to Chiles, and this made after the suit was commenced. Chiles asserts that this gives him a right to one-eighth, under Green Clay, as an innocent purchaser without notice. If Green Clay was an innocent purchaser, Chiles was not so. He well knew the superior equity of the complainants, and he can have no benefit from Green Clay's title, if he had any; as he is, in reference to that title, a volunteer, with full notice.

III. As to the claims of the tenants, or those who are in possession of the land. They, like Chiles, hold under the complainants, and must take their fate with Chiles. They purchased from South, who stated, that he claimed under the bond of Searcy, and this was sufficient to put them on inquiry as to the real owner of the land. All the tenants, from 1718, hold under Chiles, having purchased from him. They, therefore, have acknowledged the right of the complainants; but, as Chiles could not convey their right, they cannot avail themselves of the purchase from him 2 Bibb 508. By the purchase from Chiles, they held a title consonant to that of the defendants. No adverse title can be so acquired. They never

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were in possession, adversary to the possession of the appellants. What, in Kentucky, according to the decisions of the courts of that state, is an adversary possession? Holding under a different or opposing title, adversely; not when both hold under the same title. This principle brings the purchasers from South under the title of the heirs of Hoy, which is not adverse. 4 Bibb; 3 Litt. 134, 20; 5 Ibid. 316; 6 Ibid. 444. In two of the cases cited, Chiles was a party. In the record of the case, there appears a recovery from the tenants by Chiles, under the title of Hoy's heirs. The appellants have a conveyance from Mrs. South, who was one of the heirs of Hoy. The sale by her husband could give no title.

In reference to the allegation of champerty, which is made from the connection of Boon Engles with the case, it is urged, that at the time of [193] the agreement between Engles and Boone, *there was no law against champerty, in Kentucky. The law against champerty was repealed in 1798, and was not renewed until 1824.

This is a contest between two equities; and the complainants have the elder, and are justly entitled to a preference. They have five-eighths of the land, besides Newland's one-eighth; and yet the decree gives them but four-eighths. They are also entitled to a proportionate decree for the rents and profits.

Underwood, for William Chiles.—The bond of Searcy stipulates that a title shall be made, and this has been done, and the obligation has been complied with; and yet a bill in chancery is filed to have a title made. The complainants ask to have done, what is already done. The obligation of the bond was completed, by the issuing of the patents to Hoy. All he was to obtain, was delivered to him, and there is then no foundation for this proceeding. If there could be a claim for a deed with warranty, even this is satisfied by the patents.

The bill does not charge fraud in Searcy, by assigning the plat and certificates, so that they could get the title; and Searcy or his heirs are not made parties to this proceeding; and yet a specific execution of Searcy's contract is asked. This is an objection to the proceeding. The assignee, Boone, has no right to complain of the assignment of the title to Hoy, unless he proves that Searcy had no notice of his right to receive it. By the assignment of the bond to Boone, by Hoy, he undertook nothing but as a surety; and there is no remedy against a surety, under the laws of Kentucky, until after the principal has been prosecuted to insolvency; which has not been done.

Nor does the bond furnish a sufficient description of the land, so that a specific performance can be asked from a court of equity. No decree can be given for a conveyance of any particular part of the land. The bond is for 700 acres; the survey includes 2000 acres; and the appellants ask one-half of that quantity. Out of what part of the survey, is the 700 acres to be taken? They can have but 700 acres. Hoy *is to have the first choice; but he must have made it, and specially designated the part chosen, before a bill in equity for any part of the land could be filed. It is now too late, to make the election as to a particular part. Forty or fifty years have elapsed. The lapse of time has barred all remedy on the bond, if it ever existed. The courts of Kentucky allow a bill for a specific execu-

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tion of a contract to be filed in favor of possession after twenty years ; but in no case do they permit the proceeding, when twenty years have passed, and there has been no possession. 1 Dana 236. To escape from this rule, it is attempted to show, that the case of action has originated within twenty years.

The construction of the bond, which is claimed by the appellants, is denied. The title was to be made, within a short period : and the assertion that the history of the country shows, the title could not have been made soon after the date of the bond, is contradicted by the fact, that the patents for the land were soon obtained. The terms of the bond have reference to the granting of the patents. The longest indulgence given by the laws of the state expired in 1798. If the time could be extended to 1800, this suit was not brought until twenty-three years after ; and there is nothing which, satisfactorily, accounts for the delay.

Searcy, or his heirs, and Hoy, or his heirs, should have been made parties. The rule in Kentucky is, that all parties, who have an interest, should be before the court, for the settlement of all the matters. This has not been done, and the proceedings are irregular.

There is another principle which has a strong influence in this case, and which is the established law in Kentucky. When this bond was given, it was not assignable. The statute making it assignable, passed long after it was made. The courts of Kentucky have decided, that where you proceed on an instrument, assigned before the statute, you must bring in all the heirs, and all others interested.

Another objection to the complainants' success, arises from the survey containing 2000 acres, under the pre-emption and settlement rights, of which Martin has one-half ; and yet Chiles is to part with all his interest in favor of those who can recover no more than 700 acres. Who is entitled to *the surplus of the 700 acres, which will remain out of the one-half of the 2000 acres ? Chiles is to be deprived of all but that he holds [^{*195} under Green Clay, which he should hold. The complainants can have a right to no more than 700 acres, and they can recover no more ; 300 acres remain, and they belong to Chiles and to Hoy's heirs. Adversary claims exist to parts of the lands, and the adverse claimants are in possession. This is an objection to a selection being made. All the interfering claims cannot be thrown on the half belonging to Martin. No selection can now be made.

As to the deed executed by Newland and wife ; it is here as if on a *cetiorari*, and it appears to have been certified by order of the circuit court. The principle has been well settled in the court of appeals of Kentucky, allowing inferior courts to amend the record, and certify the papers which were used in the case. The deed is to be regarded as a deed on the record.

As to the answer of Newland and wife, which is referred to, in order to diminish the effect of this deed, it can have no influence against the regularly executed instrument. It is executed according to the Kentucky statutes. The deed proves that one of the heirs of Hoy had passed the land to Green Clay, and he passed it to Chiles. Clay had no notice of the claims of the complainants, and he was an innocent *bond fide* purchaser without notice. There is no objection to the deed, founded on the fact that the parties were out of possession ; no statute of Kentucky then existed, making it

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void. This deed fully entitles Chiles to the part of the land which Mrs. Newland had, as one of the children of Hoy.

Hardin, for the tenants, contended, that the whole quantity of land the appellants could claim, was 700 acres; 1000 acres of the 2000 surveyed under Searcy's rights belonged to Martin; and the bond, under which Boone claimed, was for 700 acres. Under any circumstances, no right could be asserted, with success, to a greater quantity. The deed, by a fair and equitable construction of the bond, was to be given, when the patent issued, which was in 1785; and a transfer of the plat and certificate was a compliance with it.

*^{196]} Hoy had assigned the bond to George Boone, before he obtained the title, and there is no evidence, that the bond was ever delivered to Thomas Boone. The assignment was not under seal, and it was, consequently, affected by the law on the subject of such instruments; and five years are, by the laws of Kentucky, a positive bar to claims under such instruments. A bar at law is also a bar in equity. Sugden on Vendors 272.

The power of attorney from Thomas Boone to George Boone, gave him authority to do all that he did do. Under that power, George Boone gave up the original bond to the executor of Hoy, as he found the land was covered with adverse claims; and he took another bond to make a title to other land. This was a full compliance with the obligation, and after this, the tenants purchased from South, who had the bond in his possession. They paid him, and they were in possession, for upwards of thirty years before Thomas Boone commenced this suit. If George Boone exceeded his authority, who is to suffer? Certainly, Thomas Boone. He remained silent for thirty years, and made no manifestations of a disavowal of the acts of his attorney. Will not the court presume everything in favor of a possession held under such circumstances? Will they not presume a conveyance from Thomas Boone, or some ratification of the acts of his attorney, to those who thus held the land? Cited, *Blight's Heirs v. McElroy*, 1 Wheat. 124; 10 Johns. 337. Twenty years' possession of land, in Kentucky, bars an action of ejectment; and if A. has been for that time in possession, claiming under B., a conveyance is presumed. Thirty years is a bar to a writ of right, and a patent is presumed after that time. As to presumption in favor of possession: cited, Cowp. 215. This is a stale claim, which having slept for nearly half a century, is now to be sustained by a court of equity, after the limitation of an ejectment, and even of a writ of right. It will receive no favor.

It is also contended, that the agreement between Thomas Boone and Boon Engles, makes this a case of champerty. 1 Hawk. P. C. 471, ch. 27; Stat. Hen. VIII. against purchasing pretended titles; Dig. Laws Kentucky, of 1798; Litt. Dig. 215.

*^{197]} The heirs of Hoy are necessary parties, and they should have been brought in and have answered, before the suit could properly proceed. One of the heirs is an idiot; and she could not defend by an ordinary guardian, but a guardian should have been appointed by the court. George Boone, or his heirs, and Reuben Searcy, or his heirs, were also necessary parties. 3 Bibb 11.

Crittenden, for the appellants, argued, that this case is no more than the common claim of the holders or an equitable title to obtain the legal title,

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to which they have full right in equity. The evidence in the record fully establishes the right of the complainants, under Searcy; and that right they have never parted with. Neither the fraud of George Boone, nor that of Chiles, can avail to defeat their rights; and least of all, will this court be disposed to protect Chiles, who, with a full knowledge of the rights of the complainants, has sought to defeat them, while pretending to establish them.

An objection has been raised, on the ground, that the bond does not sufficiently describe the land, so as to enable the court to carry the contract into execution; but this is not well founded. The tract of land is named, and the contract is for one-half. The decisions of the courts of Kentucky sustain a claim of this kind; and it is the delight of a court of equity to carry contracts into execution, if it can possibly be done. The construction of the powers of chancery, claimed by the defendants, would defeat its legitimate, and most necessary, and most salutary functions. If any difficulty does exist, the court will have the portion allotted, by a reference to a commissioner; a practice which exists in England, as well as in this country. As to the excess of land, it is inconsiderable; certainly, not sufficient to require that the contract shall be reformed.

It has been contended, that the transfer of the plat and certificates by Searcy to Hoy, was a performance of the bond. This was not so. Performance to Hoy was not performance to Boone. But if Searcy did comply with his bond, still, the complainants have their rights against Hoy, to the same extent as against Searcy. The assignment is special, and is equivalent to a bond from Hoy to convey, and the bill is against his heirs. [*198
*While it is said, Searcy has complied with his contract, it is yet said, he or his heirs should be made parties! The only important questions in this case are, whether Thomas Boone has parted with his rights? And whether these rights are lost by lapse of time?

The power of attorney to George Boone gave no right to sell the land, or to impair the title to it. It authorized his completing the title, and no more. Those who claim to derive a benefit from the acts of an attorney, must look to his powers. The assignment made by George Boone to South, purports to be under the power of attorney; and yet no such authority was given by it.

Nor can the allegation be supported, that Thomas Boone parted with his right to Hezekiah Boone. It was a conditional contract, and the condition was not performed. It was abandoned by Hezekiah Boone, and he paid no part of the consideration mentioned in the agreement. Chiles sought out Hezekiah Boone, and availed himself of the agreement; using the name of Thomas Boone to obtain in the Bourbon county court a title in him; thus availing himself of Thomas Boone's equity, procured a deed to be made to him. This was in 1817, and the present suit was commenced in 1822.

The lapse of time is no bar in favor of the tenants. While the general rules in favor of presumption are not denied, it is not admitted, that they apply to the claims set up by them. Mere possession is nothing; and the right growing out of it depends on the character of that possession. Possession is merely adverse, when held subordinate to the party from whose title it is derived. Under such circumstances, it inures to the benefit of him who has the right; and this was the case of the tenants; not having

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entered under an adversary title, they cannot claim adversely. But whatever might have been the position of the tenants, under a long possession, had they rested on their possession, and resisted the claims of all who desired to interfere with them upon it; they surrendered all such protection, when they purchased from South, who claimed no title but under the bond of Boone. In 1792 and 1794, they took that title, derived from Hoy; and they remained under it until 1817. The evidence fully establishes that they [199] never set up any other title; they alleged no *conveyance, but asserted to derive all they had under South, who asserted that he had Thomas Boone's title, derived from the bond. Thus they always recognised the rights of the complainants.

The decree of the circuit court gives to the complainants four parts, or one-half; but if the title remained in Hoy's heirs, they show a title to six-eighths or two-thirds; and they have also the right of Mrs. South. The only remaining right is that of Newland and wife.

They conveyed to Green Clay, who conveyed to William Chiles, and the question is, whether Clay was a *bond fide* purchaser? This is denied. He did not stand in a situation to have any protection as such. In his answer, he denies notice, generally, but he does not deny all the allegations in the bill. To entitle himself to protection, he must show payment of the consideration, before notice. He must allege, that the persons under whom he claimed were seised, or pretended to be seised; and the evidence shows that Newland and wife were not in possession; but that the land was in the actual possession of others, claiming title. This was enough to put a party on inquiry. Chiles asserted, in his bill in the Bourbon court, that Clay had notice; and the deed from Newland and wife is a mere quit-claim deed. It is denied, that the holder of a mere quit-claim deed can be a *bond fide* purchaser. Chiles cannot avail himself of Green Clay's title, even if it were valid.

The statutes of Kentucky make a deed, executed under a decree, vest the legal title; and Chiles, under the decree of the Bourbon court, had a legal title to the land. The reversal of the decree did not divest the title. But if it did revoke the deed, it was like a purchase *pendente lite*; and this court is not bound to notice it.

As to the allegation that the case is affected by champerty, it will be found, on a reference to the Kentucky statutes, that no law of champerty existed, at the time of the contract between Thomas Boone and Boon Engles. Subsequently to that time, the law was revived; but it had been repealed.

BALDWIN, Justice, delivered the opinion of the court.—*Reuben Searcy was entitled, in virtue of the law of Virginia of May 1779, as an actual settler, to 400 acres of land in the right of settlement, and a pre-emption of 1000 acres adjoining; one-half whereof he gave to John Martin for location and patenting; and by bond, dated 24th September 1781, bound himself to convey 700 acres thereof to William Hoy, "as soon as deeds are made to lands in this country in general." Hoy was to have the first choice of the lands—he bought Martin's share. On the 15th December 1781, Hoy, by an indorsement on the bond, assigned it to George Boone, his heirs and assigns; obliging himself "as surety to the within bond, and

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if the within lands cannot be obtained, by reason of a prior claim, then, and in that case, 700 acres, equal in quality and convenience, shall discharge the within bond." On the 30th April 1783, George Boone, by another assignment on the bond, assigned his right to Thomas Boone, his heirs or assigns, without recourse, if Hoy or his heirs are sufficient to make good the bond; if not, George Boone bound himself and heirs to make it good to Thomas Boone, his heirs and assigns. William Hoy obtained a patent in his own name, in 1785, for the whole tract; containing, by actual survey, about 2000 acres. Thomas Boone was in Kentucky, in 1802, 1810 and 1819, in the neighborhood of the land, but never took possession of any part, or instituted any suit to recover them; he resided and died in Pennsylvania. In 1823, he filed a bill in the circuit court of Kentucky, against William Chiles, Hezekiah Boone, George Boone, Nicholas Smith, jr., Nicholas Smith, sen., Jacob Smeltzer, George H. Baylor, Joseph Smith, John Evalt and Joseph Cummins, praying for a conveyance of the legal title, and account of rents and profits; and such other and further relief as his case may require. After his death, in December 1817, the bill was duly revived by his heirs. By an amended bill, the heirs of John South were made defendants, in 1824. By another amended bill, the heirs of William Hoy were likewise made defendants, in 1827. In 1832, the plaintiffs, by an amendment to their bill, averred that Reuben Searcy was dead, intestate, and without heirs in Kentucky; and made the heirs of George Boone parties.

The several answers of the defendants present distinct cases [*201 *for our consideration; each depending on its own circumstances, requires a separate view and examination: that of William Chiles will be first considered. The general ground of relief set forth by the plaintiffs, against all the defendants, is founded on the assignments of Searcy's bond to Thomas Boone, as conveying the equitable title to the 700 acres, of which Hoy held the legal title; on this the general equity of the bill depended, which the plaintiffs made out. In the original bill, it was charged against William Chiles, that Thomas Boone, by the bond and assignments, had a clear equity to the one-half of the land patented to Hoy (but was content to hold the parcels decreed to Chiles, as afterwards explained), of which the plaintiff had never been divested. That in 1802, he had made an assurance, that he would convey to Hezekiah Boone, provided he would pay him in four years, 700*l.*, but the purchase was declined; no money paid, and the arrangement given up. That in 1818, Chiles and the other defendants, in their own and complainant's name, filed a bill in the Bourbon circuit court of Kentucky, against the heirs of Hoy; charging that plaintiff sold the land to Hezekiah Boone, and be to Chiles, and that all the plaintiffs in that suit desired the heirs of Hoy to convey the legal title which was prayed for by the bill; that Chiles obtained a decree for a conveyance, and a deed from a commissioner appointed by the court, to himself, of the interest of Hoy's heirs; Chiles having full notice of Thomas Boone's title, and that the contract with Hezekiah Boone had not been complied with. The bill also charges, that the Bourbon suit was fraudulently instituted, and prosecuted without the knowledge of Thomas Boone; that he never consented that the deed should be made to Chiles, who had no just claim to the land, but had engaged to maintain Smeltzer,

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Smiths, Evalt, Cummins and Baylor in the possession of it. Chiles, in his answer, admits the bond and assignment to Thomas Boone ; he then sets up a sale by Thomas to Hezekiah Boone ; and that on the 30th October 1817, he, Chiles, purchased from the latter, by a written contract referred to. He admits the suit in Bourbon county was brought by himself, Thomas Boone, the now complainant, George and Hezekiah Boone ; on which there was a decree and conveyance made to him, as charged, and *202] refers to *the proceedings in that suit ; relying on it as a bar to all claim by Thomas Boone for the purchase-money. He admits full knowledge of plaintiffs' interest, coupled with the knowledge that he had parted with it ; that the sale was ratified by his agent, by power of attorney, and the agent's signature to the contract of purchase ; both of which are made part of his answer. He insists on the sale to Hezekiah ; denies fraud in instituting the Bourbon suit ; and answers its being done without plaintiffs' knowledge, by averring it was under the power of attorney, and contract with Hezekiah Boone ; and pleads the record as an estoppel in bar of plaintiffs' assertions, which he denies. He also further states, that he has purchased out and holds the interest of Hoy's heirs, as he can show by title and contracts regularly made out ; and sets up the lapse of time and total dereliction of his claim, as a bar to the plaintiffs' right to any land. The answer concludes by averring payment by Hezekiah to Thomas Boone, of the money due on the contract of 1802 ; if any balance is due, offers to pay it ; but insists that plaintiff has no right to the land to which Chiles holds the legal title, and has a right to hold it, on doing equity to plaintiff, if not already done.

In the amended bill against Hoy's heirs, the plaintiffs charged Chiles with having fraudulently, and with knowledge of Thomas Boone's equitable interest, obtained a conveyance of the title of three of the children of William Hoy, one of whom was Cecilia Newland and her husband. In answer to this bill, Chiles admits the purchase from two of these children directly to himself, and that Newland and wife sold to Green Clay, who conveyed to him : he then alleges Clay to have been an innocent purchaser for a valuable consideration, without notice, till his purchase was complete, and prays protection as to this part of the land.

This presents the contest between the plaintiffs and Chiles, in a double aspect : first, as to his claim generally ; and next, as to his claim under Green Clay, as to the share of Mrs. Newland, which will be distinctly considered. The power of attorney from Thomas to George Boone, dated 1st October 1787, authorized him to demand and receive a deed from William Hoy, for the 700 *acres, to act fully for him in the premises, to *203] appoint attorneys under him ; and on receiving a title and conveyance in the name of Thomas Boone, to give a discharge of the bond and Hoy's engagement. The agreement between Thomas and Hezekiah Boone, dated 30th November 1802, was for the conveyance of this land, for 700*l.*, to be paid in four years ; with an option to Hezekiah, within that time, to take the land or not. The agreement under which Chiles claims to have purchased is in the following words :

"Articles of agreement, made and entered into the 30th day of October 1817, between Hezekiah Boone, the county of Woodford, and George Boone, of the county of the county of Shelby, of the one part, and William Chiles,

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of the county of Montgomery, of the other part, and all of the state of Kentucky, witnesseth, that the said Hezekiah and George has this day delivered up to the said Chiles, all the papers they hold relative to the tract of land containing 700 acres, it being a part of a settlement and pre-emption granted by the commissioners to Reuben Searcy ; and the said Hezekiah and George Boone further agrees, that the said Chiles shall have the free use of all the said papers, for the purpose of coercing the title to said land, if any is to be had, if not, to get the amount in cash ; and the said Chiles, on this part, is to use diligence in getting the title, or the cash, for said 700 acres of land, and is hereby authorized to effect the above purpose, either by suit or by compromise, provided the compromise is not for less than \$3000, as he may think the most advantageous to the parties to this article ; and the said Chiles further agrees, on his part, to defray all the expenses of the above-mentioned investigation ; and when the above business is finished, the said Chiles agrees further, to pay over the one equal half of the proceeds of the above business, if in cash or bonds, and if in land, the one equal half of what may be obtained, to the said Hezekiah Boone, and the other half the said Chiles keeps for himself ; and the said George Boone declares himself satisfied with the above contract. For the true performance of the above, the said Chiles and Hezekiah Boone bind themselves each to the other in the *penalty of ten thousand dollars. Given under our hands and [**204 seals the date above written.

"Teste, &c.

HEZEKIAH BOONE, [seal.]

GEORGE BOONE, [seal.]

Attorney in fact for Thomas Boone.

WILLIAM CHILES." [seal.]

These are the papers referred to in Chiles' answer, on which he relies to make himself a purchaser of the equitable title of Thomas Boone ; under which he obtained a decree of the Bourbon court, a deed from the commissioner of the whole legal title of Hoy's heirs, and a deed from two of them to himself.

From the evidence in the record, it appears very clearly, that Hezekiah Boone never complied with the agreement with Thomas Boone ; paid no part of the purchase-money ; and abandoned the contract, many years before the agreement with Chiles, to whom the state of the contract was explained, before his agreement with Hezekiah and George Boone. As a matter of law, it is equally clear, that the power of attorney to George Boone, gave him no authority to sell the land, or to take a conveyance from the heirs of Hoy, to any other person than Thomas Boone or his heirs. Chiles admits, that when the agreement was made between him, Hezekiah and George Boone, he knew of the title of Thomas Boone ; that he instituted and conducted the suit in the Bourbon court, under the power of attorney to George Boone, who signed the agreement of 1817, as the attorney in fact of Thomas : Chiles does not pretend to have ever paid or agreed to pay anything for the land ; on the contrary, the agreement shows he was to pay nothing from his own pocket, in any event, except the expenses to be incurred. It does not even purport to be a purchase, nor contain one clause or word which can be construed as such. The papers are delivered up to him, for the purpose of coercing the title, or getting the amount in cash ; one-half of which, in case

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of success, he is to give to Hezekiah Boone, and retain the other for his own use. Nothing is to go to Thomas. George Boone, his agent, consents to it ; and Chiles procures the legal title to himself, in virtue of these papers.

*Such is the case between the parties, as presented by the pleadings, exhibits and evidence. A court of equity must be regardless of all its rules, before it can recognise Chiles as a purchaser, or as having any right whatever in the land ; it must also forfeit its character, if it sanctions such a course of iniquitous fraud. We deem it wholly useless, to contrast the relative equities of the plaintiffs and Chiles, in order to affirm their right to a decree for the conveyance of the legal title, obtained in violation of every principle which governs courts of equity ; unless he has made out some objections to the relief prayed, on grounds unconnected with the justice of the case.

It is objected, that inasmuch as the condition of Searcy's bond to Hoy was satisfied, on the latter obtaining the patent, the plaintiffs can have no equity by its assignment. This would be a sufficient answer to a suit against Searcy ; but is none to a suit against Hoy's heirs, to enforce the performance of the terms of the assignment from Hoy to George Boone ; which were an agreement to transfer the 700 acres, or an equivalent in quantity and convenience. As between Hoy and Boone, and his assigns, this gave a right to call on Hoy for the legal title, which Chiles had taken to himself, when the equity was in the plaintiffs ; whose equity depends, not on the bond of Searcy, but the contract of Hoy, made by the assignment of his equitable interest in the land.

This view of the case, disposes of the objection that the heirs of Searcy are not parties : they had no interest in the land ; their father's bond was satisfied by the performance of the condition, when the patents were obtained by Hoy ; who, by purchase from Martin and Searcy, held the legal title to the whole 1400 acres, subject to be divested only by the equity of Boone, derived by this agreement to transfer the one-half. No act, therefore, remained to be performed by the heirs of Searcy ; the title of Boone becomes complete, by the union of his equitable, with Hoy's legal title, without any interposition of the heirs of Searcy, who have no interest to defend or title to convey.

The purchase from Martin removes another objection, arising from Hoy having the first choice of the land, and dying without having made it ; whereby, as is alleged, the subject-matter of the *bill was too vague ^{*206]} to authorize a decree in favor of the plaintiffs. As Hoy held the whole tract, there was no necessity for his making the selection, it being immaterial to him, which part he held under Martin or Searcy ; his not making the election, and holding the whole in fraud of the rights of his assignee, could not prejudice him, to whom he had transferred as well the right of selection, as the land itself, in equity. Independently, however, of this consideration, we think that the identity of the land is ascertained by the terms of the bond and assignment, as well as the parties themselves ; it was the one-half of the claim of Searcy, both by pre-emption and settlement, to be chosen by Hoy ; whose assignees had the same right to choose as had been in him. Chiles, under the pretence and claim of being Hoy's assignee, made the choice, by selling to the Smiths and Smeltzer, the parts of the land on

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which they resided: and the plaintiffs, by their original bill, agree to take their share of the land, according to the decree of the Bourbon court, in that place. This selection is, therefore, binding on both parties; so that Chiles is not at liberty to contest the location, made first by his own act, in the sale to the occupants, confirmed by a decree obtained at his own suit, and agreed to by the plaintiffs, as to the part to be conveyed.

It is further objected, that there is a surplus in the survey, to which the heirs of Boone are not entitled; if this objection could be sustained by any of the parties to this suit, it could be only by those whose rights by purchase or possession would be disturbed, by decreeing to the plaintiffs more than the 700 acres. As Chiles has neither any right by purchase, nor any equity by long possession or improvements; but claims only by the fraudulent assumption of the plaintiffs' equitable title; the land exclusively claimed by him would be the first to be appropriated to them; and any surplus would be reserved for the benefit of those who had some pretensions to an equitable interest in it.

The lapse of time and the staleness of the plaintiffs' equity, is also set up as a bar to a decree in their favor; but whatever effect time may have in equity in favor of a possession long and peaceably held, it can have none in favor of Chiles, whose only claim is under the equity of Thomas Boone, and against whom the *present suit was brought in six years after he first interferred with it. It cannot be permitted to him, to acquire [*207 the legal title of Hoy, in virtue of Boone's equity, and to hold it to his own use, on the ground that Boone's right had become extinct by the lapse of time, before he acquired it. The means by which the legal title has been conveyed to Chiles, have affected his conscience too deeply with fraud, for a court of equity to suffer him to enjoy its fruits. As to him, the plaintiffs have established a right to a decree for the conveyance of whatever title he may have derived by any conveyance to himself directly, of the legal right of Hoy's heirs.

The next aspect of the case between the plaintiffs and Chiles, is presented by the interposition of Green Clay, as an innocent purchaser from Newland and wife, for a valuable consideration, without notice; under whom he claims protection. In the amended bill, the plaintiffs charge the purchase from Newland and wife to have been made fraudulently, and with notice of their title; in answer to which, Chiles states, that Green Clay bought and received the title from John Newland and wife, knowing which, he made him a defendant in the Bourbon suit, charging him to be a guilty purchaser, with notice of the equity arising from the bond of Hoy; but Clay denying notice, and not being able to prove it, Chiles bought his share, paid for it, and obtained a conveyance. He then refers to Clay's answer in the Bourbon court; and insists, that Clay was an innocent purchaser, for a valuable consideration, without notice, till his purchase was complete. In that suit, Chiles had charged Clay not only with notice, but that he purchased from Newland and wife, binding himself to make good all the contracts of William Hoy. In his answer, Clay states, that the contract he made with Newland and wife was *bona fide*, in good faith, for a valuable consideration paid them, without notice or knowledge of any claim by Chiles; which he believes is founded in fraud and imposition; "as to the contract between this respondent and Newland and wife, it is committed to record, and will speak

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for itself ; and this respondent believes the complainant, Chiles, has misrepresented the true meaning thereof ;" but does not deny the averment that *208] he was *bound to perform Hoy's contracts. The answer of Newland and wife to this part of the amended bill, states, that, if they ever had any interest in the land, they have transferred their interest, by a writing, amounting to a quit-claim, to Green Clay, but they never conveyed their title by deed, to him or any one else. This is the substance of all the pleadings on this part of the case. In 1821, the Bourbon county court made a final decree in favor of Chiles, as well against the heirs of Hoy, as Green Clay; which was reversed by the court of appeals in 1827, for the want of proper parties, without any examination of the merits.

In March 1825, Green Clay, by his indenture, granted to Chiles all the right, title and interest which he holds by a deed from Newland and wife, dated 28d of May 1814, to the tract of Searcy, and a pre-emption and settlement right of one Townsend, in consideration of \$216, with warranty against himself and heirs, but against no other person. The deed from Newland and wife to Green Clay was not referred to in the pleadings, made an exhibit in the cause, nor, so far as appears, used in the circuit court; it was no part of the record before us, at the argument of this cause at the last term, and no suggestion of diminution was then made. At the May sessions of the circuit court, on a suggestion of the defendant, that this deed was on file, and had been used at the hearing, the court ordered it to be certified to this court ; and the counsel for plaintiffs having agreed to consider it as returned on a *certiorari*, it has been read, and we have taken it into our consideration as an exhibit in the cause. In doing this, however, we must be distinctly understood, as clearly of opinion, that it is not admissible, by the rules of appellate courts ; who can act on no evidence which was not before the court below, nor receive any paper that was not used at the hearing. 9 Pet. 731. Nor would it have been a proper subject for that court to have considered, had it been offered to make out the case of the defendant ; the deed was not set up or relied on in the answer of Chiles or of Clay, which was referred to and made a part of it ; the existence of such a deed was no part of their allegations. Clay asserted merely a contract ; Chiles alleged only that Clay bought and received the title of Newland and wife, without *209] stating what the *title was, or how purchased ; whether by deed or otherwise. There was, therefore, no allegation in the answer of either, which referred to the deed ; it was not made a part of their case, which was put on a contract of purchase, and not a deed consummating it by a conveyance. A party is not allowed to state one case in a bill or answer, and make out a different one by proof ; the *allegata* and *probata* must agree ; the latter must support the former (4 Madd. 21, 29; 3 Wheat. 527; 6 Ibid. 468; 2 Ibid. 380; 2 Pet. 612; 11 Wheat. 103; 6 Johns. 559-63; 7 Pet. 274) : and there is no one subject of equity cognisance, on which there is a wider difference between a deed and a contract of purchase, than in the one now under consideration. A purchaser with notice may protect himself, under a purchaser by deed without notice ; but cannot do it by purchase from one who holds claims by contract only. The cases are wholly distinct. In the former, the purchaser with notice is protected ; in the latter, he has no standing in equity, for an obvious reason—that the plaintiffs' elder equity shall prevail, unless the defendant can shelter himself under the legal title acqui-

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red by one whose conscience was not affected with fraud or notice, and who can impart his immunity to a guilty purchaser, as the representative of his legal rights, fairly acquired by deed, in such a manner as exempts him from the jurisdiction of a court of equity. Such a purchase affixes no stain on the conscience, and equity cannot disturb the legal title. But as it does not pass by a contract of purchase, without deed, the defendant can acquire only an equity, the transfer of which does not absolve him from the consequences of his first fraudulent purchase. His second purchase of an equity will not avail him, more than the first, for the original notice of the plaintiffs' equity taints his conscience, so as to make him a mere trustee, if he holds the legal title from one who is not an innocent *bond fide* purchaser. If, then, Green Clay purchased only by contract from Newland and wife, they held the legal title; such was the case presented by the answer on which Chiles must stand at the hearing; but if permitted to rely on a deed, the court would render a decree on a case not before them, or one which the plaintiff would be prepared to meet. 6 Johns. 349. For these reasons, we should have omitted any notice of this deed, but as it has been commented *on in the argument, and it is for the interest of all parties, that the [*210] merits of the case be finally adjudicated, we have, for this purpose, considered it as evidence in the cause. It is an indenture, for the consideration of one hundred dollars, granting to Green Clay, his heirs and assigns, all the right, title, claim and interest of Newland and wife, in the real and personal estate of William Hoy; all debts, dues, demands, rents and profits, in law or equity, to which she was entitled, as one of his heirs and legatees, with warranty against themselves and all claiming under them, but against no other person whatever; and with also an agreement for further assurance, but in such a way as not to make themselves liable further than to convey such title as descended to them from William Hoy.

This is the case set up in the answer, and made out by the proofs in the cause, to make out Green Clay to be such a purchaser, that his deed to Chiles will absolve the latter from the consequences of his fraudulent purchase, with full notice of the plaintiffs' equity; whether this is such a case as will give to Chiles the protection he claims, depends on the rules which courts of equity have adopted as to *bond fide* purchasers, for a valuable consideration, without notice. It is a general principle in courts of equity, that, where both parties claim by an equitable title, the one who is prior in time is deemed the better in right (7 Cranch 18; 18 Johns. 532; 7 Wheat. 46); and that where the equities are equal in point of merit, the law prevails. This leads to the reason for protecting an innocent purchaser, holding the legal title, against one who has the prior equity: a court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction. Sugden on Vend. 722. Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser, who has put himself in peril, by purchasing a title, and paying a valuable consideration, without notice of any defect in it, or adverse claim to it; and when, in addition, he shows a legal title from one seised and possessed of the property purchased, he has a right to demand protection and relief (9 Ves. 30-4), which a court of equity imparts liberally. Such suitors *are its most especial favorites. It will not inquire how [*211] he may have obtained a statute, mortgage, incumbrance, or even a

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satisfied legal term, by which he can defend himself at law, if outstanding ; equity will not aid his adversary in taking from him the *tabula in naufragio*, if acquired before a decree. Show. P. C. 69 ; 4 Bro. P. C. 328 ; 1 T. R. 767 ; Prec. Ch. 65 ; 7 Ves. 576 ; 10 Ibid. 268, 270 ; 11 Ibid. 619 ; 2 Ch. Cas. 185-6 ; 2 Vin. 161 ; 1 Vent. 198. Relief will not be granted against him, in favor of the widow or orphan (Prec. Ch. 249 ; 2 Ves. jr. 457-8 ; 5 Bro. P. C. 292) ; nor shall the heir see the title-papers (18 Vin. 115 ; 1 Ch. Cas. 34, 69 ; 2 Freem. 24, 43, 175) ; it is a bar to a bill to perpetuate testimony, or for discovery (1 Harrison's Ch. 261-3 ; Sugden 723-4 ; 1 Vern. 354) ; and goes to the jurisdiction of the court over him ; his conscience being clear, any adversary must be left to his remedy at law. 2 Ves. jr. 457 ; 3 Ibid. 170, 183 ; 9 Ibid. 30 ; and 18 Johns. 532 ; 7 Cranch 18.

But this will not be done, on mere averment or allegation ; the protection of such *bond fide* purchase is necessary, only when the plaintiff has a prior equity ; which can be barred or avoided only by the union of the legal title with an equity, arising from the payment of the money, and receiving the conveyance without notice, and a clear conscience. It is setting up matter not in the bill ; a new case is presented, not responsive to the bill ; but one founded on a right and title operating, if made out, to bar and avoid the plaintiffs' equity, which must otherwise prevail. 9 Ves. 33-4. The answer setting it up is no evidence against the plaintiff, who is not bound to contradict or rebut it. 14 Johns. 63, 74 ; 1 Munf. 396-7 ; 10 Johns. 544-8 ; 2 Wheat. 383 ; 3 Ibid. 527 ; 6 Ibid. 468 ; 1 Johns. Ch. 461. It must be established affirmatively, by the defendant, independently of his oath. 6 Johns. 559 ; 1 Ibid. 590 ; 17 Ibid. 367 ; 18 Ibid. 532 ; 2 Johns. Ch. 87, 90 ; 4 Bro. C. C. 75 ; Ambl. 589 ; 4 Ves. 404, 587 ; 3 Johns. 583. In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly ; that the vendor was seised in fee, and in possession ; the consideration must be stated, with a distinct averment that it was *bond fide* and truly paid, independently of the recital in the deed. Notice must be denied, previous to, and down to, the time of paying the money, and the delivery of the deed ; and if notice is *specially charged, the denial [212] must be of all circumstances referred to, from which notice can be inferred ; and the answer or plea show how the grantor acquired title. Sugden 766, 770 ; 1 Atk. 384 ; 3 P. Wms. 2801, 243, 307 ; Ambl. 421 ; 2 Atk. 230 ; 8 Wheat. 449 ; 12 Ibid. 502 ; 5 Pet. 718 ; 7 Johns. Ch. 67. The title purchased must be apparently perfect, good at law, a vested estate in fee-simple. 1 Cranch 100 ; 3 Ibid. 133-5 ; 1 W. C. C. 75. It must be by a regular conveyance ; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor, and has no better standing in a court of equity. 7 Cranch 48 ; 7 Pet. 271 ; Sugden 722. Such is the case which must be stated, to give a defendant the benefit of an answer or plea of an innocent purchase without notice ; the case stated must be made out, evidence will not be permitted to be given of any other matter not set out. 7 Pet. 271.

Such are the privileges of innocent purchasers, and such the guards against those who may assume their character in courts of equity ; we have only to apply their law to the answers of Chiles and Clay, together with the exhibits and proofs in the case, to ascertain whether Clay filled that character, when he conveyed to Chiles, or at any other time. The answers are as

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barren of the averments necessary to make a case of such a purchase as would be protected against the prior equity of the plaintiffs, as the record is of the proof of any fact to support it. Nor does the consideration of the deed from Newland and wife to Clay, bring the case any nearer to the established rules and principles of equity. Though, in form, a grant by indenture, it is, in effect, a mere release and quit-claim, as stated by Newland and wife in their answer ; it does not purport or profess to convey the land in controversy ; nor does it assert any title to, or seisin of it ; the consideration expressed does not apply to this land, more than to a legacy or personal property. The grant is definite only in one respect, that it is of whatever descended to the grantors from William Hoy, but does not specify what it was ; and the words of the grant are fully satisfied, if anything so descended, whether realty or personalty. As to this land, Hoy was a trustee, by his own contract ; nothing did or could descend to his heirs, but the dry, barren, *legal title, without a shadow of beneficial interest ; which was all that Newland and wife intended to convey, or Clay to receive, by the deed. The covenants of warranty, and for further assurance, are expressly limited to their right, such as it was, and to their own acts only ; they gave no covenant against the acts of Hoy : and by conveying only such interest as they held by descent, it passed to Clay with the same incumbrance of Boone's equity, as if it had remained in Newland and wife ; who, neither in their answer, nor by their deed, pretend to any title or right. These circumstances make the deed suspicious on its face ; and in the absence of affirmative proof to support the recital of the payment of the consideration, of any evidence of seisin, or even a claim of title by the grantors, rather weaken than sustain the answer. When we find the distinct admission, and full proof of the prior equity of the plaintiffs, with full notice to Chiles, who claimed, not as a purchaser, but by a special contract with Hezekiah Boone, for the division between themselves, of whatever, either of land or money, they could recover, in right of Thomas Boone's known equity, and with the plain intent to defraud him ; the purchase from Clay, and the setting him up as innocent purchaser for a valuable consideration, without notice, under all the circumstances of this case, so far from purging the conscience of Chiles of its original taint, or imparting to him any protection as the representative of Green Clay, stamps the conduct of both with bad faith. Chiles appears on this record, a mere pretender to a purchase ; by his agreement with Hezekiah Boone and George Boone, as the attorney in fact of Thomas Boone, he purchased the title of neither ; his only claim under it was to the one-half of whatever he could acquire. He did not, therefore, even fill the character of a purchaser with notice, who by the rules of equity may purge his guilty conscience by purchasing from one whose clear conscience and legal title place him beyond the jurisdiction of equity ; the immunity of an innocent purchaser cannot be imparted to the fraudulent usurper of another's rights, without purchase.

But there is one circumstance, which saves us the necessity of considering the defects in the averments of the answers or proofs, of the deed from Newland and wife to Clay, or from him to Chiles. *Chiles states, in his answer, that being unable to prove notice to Green Clay, before his purchase from Newland and wife, he purchased from Clay ; yet he did so establish the fact of Clay's guilty purchase ; that he obtained a

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decree against him in the Bourbon court. He purchased from Clay, while that decree was in full force; and now appears on the record, claiming to be protected under this purchase, by the equity of Clay, as an innocent purchaser; when Clay, after being an adjudged *mala fide* purchaser, by the final decree of a court of competent jurisdiction, clothed Chiles with his own character, by his deed in 1825. It would present the administration of equity jurisprudence in different courts, on very different principles, if Clay, who could not protect himself in a state court at the suit of Chiles, could protect Chiles here, at the suit of Boone; or that Chiles, after procuring the decree against Clay, in a suit to which he made Thomas Boone a plaintiff, on the ground that he purchased with notice; should now obtain a decree against Boone, on the ground that Clay was an innocent purchaser, for a valuable consideration, fully paid, without notice of any defect in his title, till it was complete at law, by a conveyance in fee, and in equity, by the actual payment of the money. Neither the pleadings, the exhibits, nor the evidence on this record, afford us any warrant for such a proceeding: on the contrary, they make it our duty to decree a conveyance from Chiles to the plaintiffs, of whatever right or title he may have acquired by the deed from Green Clay.

We are next to consider the case of the plaintiffs, as to the other defendants. The heirs of South, by their answer, disclaim any interest in the land; nor does it appear, that the heirs of Hezekiah or George Boone have any interest in the land, or at any time have been in possession, or held any title under Hoy's patent. As to these defendants, therefore, there is no subject-matter for any decree, except for the dismissal of the bill.

As to the heirs of Hoy, the plaintiffs have made out an undoubted right to a conveyance of the legal title. Those who have answered, set up no title or claim to the land; and they must execute the trust which has descended to them, by conveying their legal title to the plaintiffs.

*John Evalt is admitted to have been in possession for more than
*215] twenty years, under an adverse title, by patent to Flournoy. The plaintiffs have, therefore, no right to the land thus held.

Nicholas Smith states, in his answer, that he holds fifty acres of the land claimed by the plaintiffs, by purchase from John Jones, by deed, which he makes an exhibit in the cause; that this fifty acres is a part of Flournoy's patent, which he holds adversely to the claim of Searcy. The deed is dated in December 1797, conveying, in consideration of 125*l.*, fifty acres of land, with general warranty. Independently of the deed from Jones, it is clearly proved by several witnesses, that Smith made the purchase from him; settled on the land in 1798, where he lived till his death; and that there was a continued possession and residence on the land, by him, and those claiming under him, to the present time, and valuable improvements made. The plaintiffs do not controvert this purchase or residence; they do not charge Smith with any act affecting his conscience, or show that he ever purchased, or made claim under them, or any person asserting any right under their title. The title of Flournoy appears to be by an equity older than Searcy's; though his patent is later than Hoy's. We can perceive no ground of equity, to entitle the plaintiffs to a conveyance of the title thus acquired by Smith. He and those under him, have had an adverse possession of twenty-

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five years, before the bringing of this suit ; and his possession of the fifty acres cannot be disturbed, either at law or in equity.

The only charge in the bill, against the remaining defendants, is their combining to institute the suit in the Bourbon court, of which there is not only no proof, but the contrary appears by the record of that suit ; they were not parties, and took no part in the prosecution of it. The bill, however, alleges, that Chiles "had made some engagement to maintain Smeltzer, Smiths, Cummins and Baylor, in detaining possession, and enjoying the profits, for a long time past, still refusing to surrender. The prayer against them was, "to compel the defendant, Chiles, or such of the defendants as now hold the title, to convey the tract described by the deed, under the decree to Chiles, to account for rents and profits, and such other and further relief as his case may require." *The answer of Nicholas Smith, jr., [216 Nicholas Smith, sen., Jacob Smith and George H. Baylor was joint and several ; jointly, they denied being parties to the Bourbon suit, or being bound by the decree. They admit, that Searcy claimed the land ; that it was located by Martin, and patented to Hoy ; allege a surplus of five or six hundred acres in the survey ; and that plaintiff could be satisfied, without disturbing them ; plead the lapse of time, and staleness of the demand as a bar ; and deny the right of the plaintiffs to recover. They state, that they have been informed, that Hoy assigned Searcy's bond to George Boone ; call for proof of the assignment to Thomas Boone ; charge, that if the bond was assigned to him, it has long since been cancelled between Thomas and George Boone ; that George Boone assigned the land to John South, investing him with all the title to the land which George Boone derived from William Hoy, by the agency, consent and authority of Thomas Boone, if the bond was ever assigned to him. They also charge, that South, by virtue of such assignment, held the bond till his death, and that his executor held it, till Chiles obtained it by fraud ; and that they are entitled to certain parcels of land, by purchase for a valuable consideration, from John South. They then aver, that Peter Smeltzer purchased 400 acres, and took South's bond, with surety, for the title ; took possession of the same in 1791, settled upon, improved and resided on it till his death. That George H. Baylor claims under Smeltzer, by purchase from his heirs, for a valuable consideration ; now resides upon it ; and that a continued residence has been kept upon the land, on which there are large and valuable improvements. That Nichols Smith holds 200 acres, by purchase from Jacob Swope, in 1797, who purchased from George Pope, in 1795, who purchased from South, in 1794. That Smith resided on this land from 1798, and made valuable improvements thereon ; which residence has been continued by him, and those under him, to the present time. These defendants then charge, that Thomas Boone was in Kentucky, in 1802, 1810 and 1819 ; knew of the sales by South of the land they occupied, but gave them no notice of his title ; and on the contrary, disclaimed it, in conversation, and then proceed to give an account of their connection *with Chiles, in substance, as follows : He came to the Smiths and Smeltzer, stating that he held Hoy's legal title to the land ; that South's bonds were worth nothing, and they would lose the land and improvements ; whereupon, they, ignorant of their rights, and the title to the land, compromised with Chiles, agreed to give him up South's bonds, and to pay him ten dollars an acre, in three annual instalments, for 600 acres, each to pay

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for his own share. Chiles was to make them Hoy's title, but having received South's bonds, he obtained from his executor the bond of Searcy ; struck out the assignment to South ; gave up his bonds to his executor ; shortly after which, he commenced the suit in the Bourbon court, and obtained the decree referred to in the bill. They charge Chiles with fraud in the whole transaction ; pray that their answer may be taken as a cross-bill against Chiles ; that he be compelled to restore the bonds of South ; or that they may have such a decree against him as their case may require, and their contract with him cancelled. They deny the plaintiffs' rights to rents and profits, in case of recovery ; but if they lose the land, pray a just compensation for their lasting and valuable improvements ; and then set up a contract between Thomas Boone and a certain Boon Engles, in 1822, in pursuance of which, the present suit was brought by him, in their names ; which they allege to be within the statutes of champerty and maintenance, on which they rely, as well as on the common law, the rules and principles of equity, and the statute of limitations. Cummins claimed by purchase from Smeltzer, which his heirs, in their answer, aver to be fraudulent ; but if it is valid, they set up thirty years' possession of part of the land, before suit brought, as a bar. Nicholas Smith, by an amended answer, refers to a copy of Searcy's bond, with all the assignments thereon, previous to the erasure of the assignment by George Boone to South ; "under whom all the tenants in possession, including this defendant, claim their several portions of said 700 acres of land ; which assignment bears date August 6th, 1792." "And if said South, as executor of William Hoy, had ever sold any portion of said 1400 acres, or the *218] moiety, 700 acres, claimed by complainants herein (for this 700 *acres was never defined to any of the original purchasers, previous to said assignment, which is not admitted), this defendant relies confidently that said assignment last mentioned of said bond to him, said South, would inure in equity to confirm their claim ; nor could its subsequent cancellation, or the surrender of said bond, with the consent of the executor or administrator of South, affect or impair their claims. He re-exhibits the copy of said bond, with the several assignments thereon, and relies on time and circumstances, to show that the one from George Boone to South was done by proper authority from Thomas Boone."

The cause was at issue on the general replication. At the hearing, all the material facts alleged by the defendants in relation to their purchase from and under South, their agreement with Chiles, the surrender of South's bonds to his executor, and the delivery by him to Chiles of Searcy's bond, with the assignments thereon, were fully established by the exhibits and proofs in the cause ; as also, their possession, residence and improvements on the land, as stated in their answer. But they wholly failed in proving that the assignment of Searcy's bond by George Boone to John South, was made with the knowledge, consent or authority of Thomas Boone.

South married a daughter of William Hoy, to whom he was executor ; the agreement between Chiles, the Smiths and Smeltzer, was made in 1817 ; South's bonds were given up in the winter of 1817-18, when Chiles received the bond of Searcy ; the suit in the Bourbon court was commenced in January 1818, and is yet pending.

This suit was commenced in 1823, while the decree of the Bourbon court was in force, and before any appeal to the court of appeals of Kentucky ;

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it was before this court in 1834, on a certificate of division from the circuit court of Kentucky, on the question whether they had jurisdiction of the cause. It was then decided, that it had jurisdiction ; that the heirs of Hoy were not necessary parties, except for the purpose of obtaining the legal title, if it remained in them ; that a decree might be made without them, as to parties properly before the court ; that the heirs of *George [*219 Boone were not necessarily defendants, and no proof need be made respecting them. (8 Pet. 535-7.) All questions of jurisdiction of parties are, therefore, closed.

The objections to the plaintiffs' recovery, on the ground of the contract between Thomas Boone and Boon Engles being within the statutes of champerty and maintenance, cannot be sustained, for two reasons : 1. The English statutes on this subject, which were adopted in Kentucky, punished the offence, and declared the contract for maintenance void between the parties, but did not direct or authorize the dismissal of the suit instituted between other parties in furtherance of such contract. Boon Engles is no party to this suit ; and it does not concern the defendants, whether it was commenced and is conducted by his agency, or by the plaintiffs themselves ; the right of plaintiffs is not forfeited by such an agreement, and it may be asserted against the defendants, whether the contract with Boon Engles is valid or void. Litt. Select Cas. 522. 2. By the act of 1798, which was in force when this contract was made and suit brought, no person could be prevented from prosecuting or defending any claim to land held under the land laws of Virginia ; nor shall any suit brought to make good such claim be considered as coming within the provisions of the common law or any statute against champerty or maintenance. 1 Mor. & Brown, Ky. Stat. 282-5. These statutes were not revived till 1824.

The first question of fact which arises is, in what right the Smiths and Smeltzer first entered upon the land purchased from South. The amended answer of Nicholas Smith, Junior, is explicit on this point ; stating that all the tenants in possession, including himself, claim under South, by the assignment of George Boone to him. Though this answer is not evidence against the other defendants, yet, as they do not deny notice of the assignment to Thomas Boone, before their purchase, and in their answer pray for a restitution of South's bonds, there is good reason to believe the statements of Smith, especially in connection with the proofs in the cause.

*Barbara Smeltzer, the widow of Peter, testifies, that he settled [*220 on the land in 1791 ; South came down and marked out the 400 acres ; that it was held under South, who claimed under the bond from Searcy, assigned by Hoy to George Boone. That at the time they first settled, South represented to Smeltzer that he had traded for that bond ; they were soon after informed, that he had not got the bond, but soon after obtained it from George Boone ; that Smeltzer soon afterwards informed George Boone of what had been done, who appeared well pleased. William Johnson testifies, that Smeltzer purchased from South, and began to improve in 1786. L. Eastin states, that he took possession in 1789. It is also testified by William Boone, that South had sold, before he got the bond from George Boone ; and the evidence of Mrs. Smeltzer is strongly corroborated by Benjamin Mills, Esquire, to whom some of the Smiths and Smeltzers made a professional application relative to the chain of title

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between South and Hoy. He found no authority to George Boone to assign the bond to South, which was the only claim, or color of claim, he had to the land ; hence, and from his knowledge of South's character, he concluded, he had sold without claim, and brought no suit for them. Joseph Steele testifies to the declaration of George Boone, that South was in treaty with him for the bond, for some time before the assignment was made ; and that Smeltzer was informed, previous to his purchase, that the land belonged to Thomas Boone. No objection having been made, on the hearing, to the deposition of Steele, in relation to the declarations of Boone, they are competent evidence ; and in connection with that of the other witnesses, fully support the testimony of Mrs. Smeltzer, and the amended answer of Smith. We must, therefore, consider Smeltzer as having purchased from South, his right under the bond of Searcy, and the several assignments down to South, with notice thereof. Smith's amended answer is conclusive, that he so purchased the 200 acres, in 1797, by the assignment of South's bond. In his deposition, he also states, that he soon afterwards purchased from South, sixty or seventy acres, in addition, of which he took possession, and *has ever since held, under the same claim ; that he *221] lent South \$300, which was to go in part payment of the land, but finding South had no title, he recovered it back by suit.

In 1817, the parties stood thus : Smeltzer had been in possession under a claim of title by Searcy's bond and assignments, for twenty-six years, of 400 acres. Smith had held possession of the 200 acres, nineteen years, which, added to the possession, of Pope and Swope from 1794, made twenty-three, and of the sixty or seventy acres, for about eighteen years, when they gave up South's bond and agreed to purchase from Chiles, who claimed the legal title of Hoy. During this time, Thomas Boone had neither affirmed nor disaffirmed the sale by South, made no entry on the land, gave any notice to Smith or Smeltzer, instituted no suit, nor made any effort to obtain the legal title from Hoy's heirs ; though his right was then the same as now made out, and had been vested in him for thirty-six years. He made George Boone his agent, in 1787 ; yet, for thirty years, he appears to have been wholly inactive in asserting or endeavoring to complete the title. The agreement with Hezekiah Boone, in 1802, seems to have been the only positive assertion of a right in the land made by Thomas Boone. When the present suit was commenced, Smeltzer, and those under him, had been in possession thirty-two years ; Smith, twenty-five years, of the 200 acres, and twenty-one, of the sixty or seventy acres ; and the equity of Boone arose forty-two years before.

From this state of facts, it is perfectly clear, that, if Smiths and Smeltzer can be considered as claimants in their own right, adverse to the title of Thomas Boone, the lapse of time alone is a complete bar to any equitable relief : the rules of equity as to the effect of time in favor of possession, are too well settled to be stated or doubted. 2 Jac. & Walk. 138, &c. ; 9 Wheat. 497 ; 10 Ibid. 168 ; 3 Pet. 52 ; 6 Ibid. 66 ; 5 Ibid. 491 ; 7 Johns. Ch. 122 ; 10 Wheat. 150-74 ; 9 Pet. 416.

Thomas Boone's only standing in a court of equity, is by considering these defendants as his trustees, by their purchase under South or Chiles, *222] or both. As neither of them sold by any lawful authority from him, he is not bound by, and may *repudiate, their acts ; the consequence

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of which would be a bar of his claim on these defendants holding adversely. But as South assumed the right to sell the interest of Thomas Boone, in virtue of the assignment from George Boone, as his attorney in fact, and Chiles acted throughout all his proceedings, under the agreement signed by George Boone, in the same capacity, which was an express recognition of the original right of Thomas Boone; he may waive the defect in the power of attorney, ratify the acts of his agent, and elect to consider the purchasers from South and Chiles as holding through and under him. When the purchasers from them discovered, that neither South or Chiles had any right in the land, they too had a right of election to hold under the title which they intended to purchase; under which they had taken possession of the land, and held it till the discovery of the fraud; or to disclaim the purchase, renounce all rights upon it, and remain in possession as claimants adverse to the title under which they entered.

It is unnecessary to decide on the effect of such disclaimer, had it been made before the purchase from Chiles, or the filing the bill. We cannot find in the evidence or pleadings, that Thomas Boone ever made any election, as to considering these defendants holding under or adverse to him; but it is very clear, that they originally purchased, entered and held under his title; and it does not appear, that they ever assumed an attitude of direct hostility to it. We have come to the conclusion, that we must now consider them, as holding by their original claim, so far as to authorize the plaintiffs to make them their trustees, in virtue of their purchase from South, and ratify the agreement of Chiles. There is no other way in which the plaintiff can escape from the consequences of the staleness of his equity, coupled with the long possession of the defendants, than by considering them as friendly purchasers and possessors under them. The plaintiffs put themselves out of court, by setting up the purchase and possession of defendants as adverse to their equity: for they then would have no protection against the lapse of time, which they have neither explained or accounted for (17 Ves. 88-9, 96; 1 Jac. & Walk. 62-3, and note; 1 Johns. Ch. 47-8; 3 Ibid. 586; 1 Ibid. *354; 5 Ibid. 187-8; 3 Ibid. 218), and all bills in equity [*223 which seek to disturb long possessions, deserve the utmost discouragement. 1 Atk. 467; 1 Jac. & Walk. 62.

The plaintiffs must, therefore, make their claim on the defendants, as their trustees, by direct contract, or by implication from the purchase under their title; in either case, the lapse of time affects them. They cannot enforce the execution of an express voluntary trust, after its known disavowal for such time, and under such circumstances as would make an adverse possession a bar. 3 Pet. 52; 7 Johns. Ch. 122; 2 Sch. & Lef. 607, 38-8. If a purchaser is made, by implication, an involuntary trustee for the vendor, so as to be affected by his equity, it must be pursued in a reasonable time. 4 Johns. Ch. 316; 3 Ibid. 216-17; 4 Bro. C. C. 136-8; 1 Cox 28; 17 Ves. 96, 160.

Though time does not bar a direct trust, as between trustee and *cestui que trust*, till it is disavowed; yet, where a constructive trust is made out in equity, time protects the trustee, though his conduct was originally fraudulent, and his purchase would have been repudiated for fraud. 4 Bro. C. C. 136; 17 Ves. 97; 1 Bro. C. C. 554. So, where a party takes possession in his own right, and was *prima facie* the owner, and is turned into a trus-

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tee by matter of evidence merely. 3 Johns. Ch. 216. And where one intending to purchase the entire interest in the land, took a conveyance without words of limitation to his heirs, passing only an estate for life, the lapse of fourteen years, after the expiration of the life estate, was a protection to the heirs of the purchaser. 5 Johns. Ch. 185-6.

What the reasonable time is, within which a constructive trust can be enforced, depends on the circumstances of the case; but there can be few cases where it can be done, after twenty years' peaceable possession by the person who claims in his own right, but whose acts have made him a trustee by implication. His possession entitles him to, at least, the same protection as that of a direct trustee, who, to the plaintiffs' knowledge, disavows the trust, and holds adversely; as to whom the time runs from the disavowal (3 Pet. 52), because his possession is thenceforth adverse. The possession of land, is notice of a claim to it by the possessor (Sugden Vend. 753-4); if not taken and held by contract *or purchase, it is, from its inception, ^{*224]} adverse to all the world, and in twenty years bars the owner, in law and equity. 8 Cranch 250; 4 Wheat. 221; 5 Pet. 354. A purchaser in possession, by a contract to sell, is in law a trespasser; but in equity he is the owner of the estate, having taken possession under the contract, and the vendor is in the situation of an equitable mortgagee. 15 Ves. 138. If the entry was by purchase, and the purchaser claims the land in fee, he is not a trustee; his title, though derivative from, and consistent with, the original title of the plaintiffs, is a present claim in exclusion of, and adverse to it. A vendee in fee, derives his title from the vendor; but his title, though derivative, is adverse to that of the vendor; he enters and holds for himself. Such was the doctrine of this court in *Blight's Lessee v. Rochester*, 7 Wheat. 548. In that case, the court said, "the vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor."

"The only controversy which ought to arise, respects the payment of the purchase-money; how far the vendee is bound to this, by law, or by the obligations of good faith, is a question depending on all the circumstances of the case. If the vendor has actually made a conveyance, his title is extinguished in law as well as equity; if he has sold, but has not conveyed, his contract of sale binds him to convey, unless it be conditional; if, after such a contract, he brings an ejectment, he violates his own contract, unless the condition be broken by the vendee; and if it be, the vendor ought to show it." "If defendant claims under a sale from plaintiff, and plaintiff himself is compelled to assert that he does; then the plaintiffs themselves assert a title against this contract. Unless they show that it was conditional, and that the condition is broken, they cannot, in the very act of disregarding it themselves, insist that it binds the defendant in good faith, to acknowledge a title which had no real existence. Upon reason, then, we should think, that the defendant in this case, under all the circumstances, is at liberty to controvert the title of the plaintiff." 7 Wheat. 548-50.

In applying these principles to the case before us, it is very clear, that neither the purchase from South or Chiles, is any *equitable estoppel ^{*225]} to the defendant's controverting the title of Boone, when he disaffirms and violates the contract of purchase, by seeking to turn them out of possession. He cannot make them constructive trustees by their purchase, and then be permitted to disavow the purchase, without subjecting

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himself to the consequences of delaying the prosecution of his right. As trustees by implication in equity, they may claim the benefit of the lapse of time; if he considers them as purchasers from him, or by a title derived from him, he can have no hold upon their conscience, to surrender him the possession, if they are willing to pay the purchase-money. Whether they purchased from him, or from another who assumed to sell by his authority and in his right, matters not; if they claim by his title, and thus become his trustees, by his affirmation of the sale, the law of equity compels him to assert his rights in a reasonable time. When he does so, the execution of the trust will be enforced; but it will be enforced on both parties, according to the terms of the purchase, and the trust which equity raises on it by implication. Equity makes the vendor without deed, a trustee to the vendee, for the conveyance of the title; the vendee is a trustee for the payment of the purchase-money, and the performance of the terms of the purchase. But a vendee is in no sense the trustee of the vendor, as to the possession of the property sold; the vendee claims and holds it in his own right, for his own benefit, subject to no right of the vendor, save the terms which the contract imposes; his possession is, therefore, adverse as to the property, but friendly as to the performance of the conditions of purchase. In virtue of his legal title, the vendor has a legal right of possession; but equity will not permit him to assert it, unless the vendee has violated the contract; he will be enjoined, if the vendee performs it. It is very certain, that a sale of the legal title by deed, creates no legal estoppel, by which a purchaser is prevented from contesting the title of the vendor, or the title of any person from whom the vendor derived title. 7 Wheat. 547, &c. It is equally certain, that the sale of an equitable title by bond, or other contract, cannot have a contrary effect in equity; which *decides according to the *equum et bonum* of each case. [*226]

In this case, Boone comes into court to obtain possession, under a equitable title only; he is barred by time, unless he can make the defendants his trustees, at the institution of the suit; he charges them with no fraud, and nothing is averred or proved against them, so to affect their conscience, as to give a court of equity jurisdiction. He is thus compelled to rest on their purchase of his title from South and Chiles, making them constructive trustees; which, on the pleadings and evidence, we are of opinion, he may do. There is, then, a trust between them; but it is that trust which, in equity, results from the contract of purchase. Boone is a trustee for such title as the defendants purchased, and were entitled to receive; they are trustees for the purchase-money they agreed to pay for it. Boone avers they bought his title, which, we think, is made out. He, then, is the *cestui que trust* as to the money, and they for his title.

To divest this trust of all mutuality, would be subversive of every rule of equity; it will never award a surrender of the possession of land by a purchaser of an equitable title, but on a clear violation of the condition of purchase, clearly proved by the plaintiff. He is without remedy at law, in this case; compelled to come into equity, he must do it; he sets up a trust in the defendants for his use; all he can ask is its execution, by payment of the purchase-money; if he has a decree for that, justice is done to him; and nothing can be more just, than to decree that he shall perform the act in consideration of which he obtains relief. If he comes into court to turn

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them out, on the ground that defendants have purchased a title which must be traced up to him, in virtue of the contract of purchase, he asserts a title against this contract, when he denies them the benefit of the purchase ; and in the language of this court in *Blight v. Rochester*, the plaintiffs cannot, in the very act of disregarding it themselves, insist that it binds the defendants, in good faith, to acknowledge the title. The defendants may contest it, when set up to defeat the purchase in this case, in equity, as it was done in that, at law.

*227] This court did not then think their decision to be *at variance with the decisions of the court of Kentucky ; nor do we think that we now, in any way, interfere with them. They have held, that the possession of the purchaser from the plaintiff without deed, is friendly to the plaintiff ; and stops the running of the statute of limitations. 2 Bibb 506. But that a vendee by deed, may, at law, contest the title of the person under whom he bought ; though a vendee by executory contract cannot, if he is in possession under, and looks to the vendor for the completion of his title : in the first case, he holds adversely, in the second, not. 3 Litt. 135-6. So, if he purchases from the patentee, and holds his bond for the title (5 Litt. 318) ; a defendant cannot, in ejectment, set up an outstanding title in a third person, if he purchased from plaintiff without deed (6 Litt. 444) ; nor can a tenant, or one who purchases from him, contest the title of the landlord. 4 Bibb 33 ; 2 A. K. Marsh. 243. These decisions are, unquestionably, correct ; but the principle on which they are founded, is very different from that which the plaintiffs' counsel deduce from them ; they admit that possession, under a deed conveying a legal title, is adverse, and that a defendant so holding may deny the title of his vendor, in a suit at law. The contract of purchase, then, is no estoppel, though by the most solemn instrument known to the law.

The same principle seems closely applicable, by analogy, to a suit in equity, in which the plaintiff rests on an equitable title only, which has been sold to the defendant, as the foundation of a decree awarding possession of the land purchased ; the proceeding is analogous to an ejectment ; the process of executing such a decree is the same in Kentucky, by an *habere facias*. It is difficult to perceive any sound reason why the same analogy should not be observed in the proceedings previous to the decree ; if the defendant, a vendee of the legal title by deed, can at law contest the title of his vendor, who is plaintiff, why may not the vendee of an equitable title by bond or other executory contract, enjoy the same right in a court of equity ? We are clearly of opinion, that the defendants in this case had such right, and that there is nothing in the evidence before us which could have deprived them of it, had they rested their case upon their adverse possession alone ; but *the admissions of Smith, in his amended answer, the proofs of *228] the cause as to Smeltzer, together with the joint answer of themselves and Baylor, place them in a different position. As to them, we are perfectly satisfied, that their possession was a perfect protection against the equity of Thomas Boone, when this suit was instituted ; but we think that his equitable right to the purchase-money agreed to be paid to Chiles, has been saved by their answer and the evidence in the case ; our only difficulty has been, whether we can, on the pleadings, make such a decree as, in our opinion, comports with the justice and equity of the case.

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The specific prayers of the bill are, that such of the defendants as hold the title, convey to the plaintiff the tract described by the deed under the decree of Chiles; neither Smiths, Smeltzer nor Baylor hold this title, or claim under the decree, or deed from the commissioner to Chiles; this part of the prayer cannot, therefore, be granted. The next is an account for rents and profits; this can be done as to Chiles, but cannot as to the others, on our views of the case. The general prayer is, such other and further relief as the plaintiffs' case may require. This is a broad prayer, on which such relief may be granted as is not inconsistent with the bill or the specific prayers. 8 Pet. 536. This case is one of an undoubted equitable title to the 700 acres of land, had it been pursued in time; but under the circumstances of the case, it is narrowed down to a claim for the purchase-money of the land, held by the defendants under the purchases from South and Chiles, at the price stipulated in their agreement with the latter. This we think is required by the case of the plaintiffs, as it appears on the whole record, without placing the defendants in any position more injurious to themselves than their answer would authorize. They pray for a restoration of South's bonds, and the rescission of the contract made with Chiles, as the means of enabling them to obtain a decree in their favor. "But should, under all the circumstances of the case, it be their misfortune to lose the land, they claim a just compensation for their lasting and valuable improvements; under such rules and regulations, according to law and equity, as their case may require and justice demand." To restore South's bonds and annul the *contract with Chiles, would not release them from their trust to Boone for the purchase-money agreed to be paid to South. [*229] The record does not inform us what was the price at which South sold the 600 acres; but if sold at the rate at which Smith bought the 60 or 70 acres, it would, with the interest, exceed the price agreed to be paid to Chiles. Besides, the restoration of South's bond, at the time of their answer, and by a decree of the circuit court, would have bound them to pay the purchase-money, with interest. In such case, the lapse of time would be no bar. If by our decree, these defendants hold the lands on the terms stipulated with Chiles, they have the same benefit of their contract with him, as if it had been consummated by a conveyance of the legal title of Hoy, and the equitable title of Thomas Boone; a position much more favorable to them, than they would be placed in by their prayer for the restoration of South's bonds, or for mere compensation for improvements. It is not to be doubted, that they would have been content with the quieting of their possession, on paying for the land, on the terms agreed on with Chiles, in 1817, on which they can now hold them, consistently with the law of the case.

Though neither of the parties have prayed for the specific relief which we think they were entitled to; we are of opinion, that all have, in substance, submitted their case to our consideration, according to the rules and principles of equity; willing to abide such decree as we shall think will do justice between them. This, in our opinion, will be done, by giving to both, the benefits of the contract with Chiles, which, under all the circumstances of the case, created, by construction and implication in equity, a mutual trust; which is executed by one party conveying his title, and the other by paying the purchase-money.

It remains only to consider the case of Cummins, who purchased from

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Smeltzer, part of the 400 acres purchased by him from South. We can perceive no equitable ground of discrimination between this and the other tenants ; the answer of the heir of Cummins admits the purchase from Smeltzer, but makes the same allegation of fraud against him as he did against Chiles. Yet, like the others, Cummins continued to hold, and his heir [230] still holds, the land so purchased, without, as appears by the record, having paid anything for it : like them, too, the heir prays for a dismissal of the bill, but in these words ; " And hence to be dismissed with her costs, &c., and such other orders as the court shall deem necessary to the equity of her case." This could not have been intended, nor can it be considered, as a peremptory prayer for dismissal, as she would, in such case, hold the land, without paying for it ; there would be no remaining equity in the case, on which the court could make an order ; it must therefore, be considered as a submission to such decree as the court should deem conformable to the equity of the case. This, in our opinion, requires that this defendant should be placed in the same situation as the other defendants, who claim under or by the purchase from South ; they all purchased only an equitable title, and must stand in the place of those from whom they purchased ; each is a trustee by implication, affected by the same mutual trust in equity.

Having thus disposed of all the contending claims between the plaintiffs and the defendants, in this very complicated case, according to their respective equities between them, as contending parties ; we are to consider of the decree to be made between the defendants. It is within the undoubted powers of a court of equity, to decree between co-defendants, on evidence between plaintiffs and defendants. 2 Sch. & Lef. 712. Its exercise is also within the general prayer of the defendants in their respective answers ; and is called for by every consideration, that requires some termination to long, inveterate and entangled litigation. With the whole case before us, and on the fullest investigation of the rights of all the parties, we do order, adjudge and decree therein as follows :

That so much of the decree of the circuit court as directs the defendant Chiles to convey to the complainants, all his right, title and interest to and in the premises named in the bill, and to deliver up to the clerk of said court, to be cancelled, the contract between said Chiles, Hezekiah and George Boone, therein referred to ; also, so much thereof as orders Jones and Fanny Hoy to convey all their interest in the premises, derived from William Hoy ; [231] and so much of said decree as directs, that if the conveyances so directed shall not be made as ordered, the clerk of said circuit court shall convey to the complainants the interest of the said parties, as by said court decreed ; and so much of said decree as orders the defendant Chiles to pay the costs of the suit, with the exception there stated ; also, so much of said decree as declares that the claim of the complainants is not to be prejudiced by the decree aforesaid, as against any of the heirs of William Hoy, who are not parties to this suit ; and so much of said decree as directs the bill of complaint to be dismissed as to the land held by John Evalt, within the bounds of Flournoy's patent ; be and the same is hereby affirmed in all things, excepting that part of said decree which excepts from the deed to be executed by William Chiles, the interest which he holds under a deed from Green Clay, as to which the said decree is reversed and annulled.

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And as to the rest and residue of said decree of the circuit court, the same is hereby reversed and annulled ; and this court, proceeding to render such decree as the said circuit court ought to have rendered, doth further order, adjudge and decree, that the said William do and shall, within six months from this time, convey to the complainants (in the manner specified in said decree as to the land therein directed to be conveyed by him) all his right, title and interest, held or claimed under the deed or conveyance from Green Clay to said Chiles. That the said Chiles do and shall, within the same time, assign, transfer and make over any contract or agreement made between him and any other persons, in relation to the land in controversy in this suit, whereby any right accrued to, or was promised or agreed to be in him to any part of said land, or any money arising or to arise from any sale or sales thereof ; and in like manner to transfer, assign and make over all such rights to said complainants. That the said William Chiles do also account to and with the complainants, for any money he may, at any time, have received from any person or persons, on or by virtue of the sale of any part or parts thereof ; also that he account to and with the complainants for any rents or profits which he may have enjoyed or *received in or from said land embraced in the patent to [*232 Hoy, under the direction of said court.

That a surveyor, to be appointed by said court, do, under their directions, ascertain the quantity of land claimed by the several defendants in this suit (except William Chiles) on the western side of the survey in Searcy's right, designated on the plat of the surveyor, dated 2d October 1831, by the letters A, D, T, U, J, K, M, E and A ; excluding therefrom all the lands within the lines of Flournoy's patent, and return a plat thereof to said court. That the bill of the complainants be dismissed as to all the land claimed by any defendant, east of the lines on said plat, designated by letters E, M, K, J, U, T ; that their bill be dismissed, as to all the land purchased by Nicholas Smith from Jones, lying within the line of Flournoy's patent, marked on the surveyor's plat, in page 66 of the printed record, by the letters L, M, N, O. That possession be awarded to the complainants, by the several defendants, of the land claimed or held by them, respectively, within the lines first herein referred to, as marked in the plat, dated 2d October 1831, and without Flournoy's line, which has not been purchased from, or held under, South or Chiles, or by any person or persons claiming or holding under them, or either of them, in virtue of any contract or agreement with them or either, by or under whose right, claim or possession, any of said defendants claim or hold any part or parts of said land.

That the surveyor, so to be appointed, do and shall ascertain the quantity of land now claimed or held by any of the defendants, mediately or immediately, by, from, through or under South or Chiles, or in virtue of any right asserted or claimed by them, or either, as aforesaid ; designating specially the quantity claimed or held by each defendant, or each class of claimants, under any one person, accordingly as they may hold or claim in severalty, or in common between themselves ; and return separate plats thereof to said circuit court. Whereupon, such of the complainants as are under no legal disability, shall, within such time as the said court shall direct, make, execute, and in due *form of law acknowledge and [*233 deliver, to the said defendants, respectively, deeds of general warranty

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in fee, for the land described in such plats, on said defendants complying with this decree, as hereinafter mentioned ; and that such of the complainants as may, at such time, be under any legal disability to make such deeds, shall, within six months from the removal of such disability, make, execute, acknowledge and deliver such deeds to the defendants, their heirs and assigns ; or that the said circuit court, as so authorized by law, may order and direct that such deed or deeds shall be made by such commissioner as they may appoint to execute the same, for and on behalf of the complainants last mentioned.

That the said defendants severally, or each class thereof as aforesaid, for themselves jointly, as they may claim or hold, do pay to the complainants for the land conveyed by them, at the rate and on the terms stated in the joint answer of the defendants, to wit, ten dollars for each and every of the four hundred acres purchased by Peter Smeltzer, and the two hundred acres purchased by Nicholas Smith from John South ; to be paid in three equal annual instalments, counting from the agreement with Chiles, assumed to be 1st December 1817. That the heirs of Nicholas Smith, or the defendants who claim or hold under him or his heirs, do pay to the complainants at the same rate, and on the same terms, for the sixty or seventy acres afterwards purchased by said Smith from South ; which said complainants shall convey as aforesaid to the defendant or defendants in possession thereof under Nicholas Smith. That the amount so decreed to be paid by each defendant, or class of defendants, bear interest from the time the instalments were payable respectively, till the time directed by the circuit court, at which the complainants are to make the deeds as aforesaid ; each defendant or class to be liable only for the sum due by themselves, and not for any sum due by other defendants. That, when the said deeds shall be executed and delivered, the sum due by each defendant or class, principal and interest, shall be paid as follows : one-third thereof to be paid in one year from the delivery of the deed, one-third in two years, and *one-third in three [234] years, with interest from the time they are payable. That the several sums so payable be paid into said court, or to such person or persons as said court, by their decree, shall order and direct ; and on such terms and conditions as to them shall seem just and equitable. That the defendants severally and respectively do, under the direction of said court, account to and with each other for any moneys received by one from the other, or any person or persons under whom they claim or have claimed, for or on account of any purchase-money of any part or parts of the land, now or at any time held or claimed by them or any of them, under or in virtue of any purchase under the title of Searcy.

That such of the heirs of William Hoy as have answered the bill of complainants, do convey to them, in the manner directed in the decree of the circuit court as to Jones and Fanny Hoy, all their right, title and interest in the land contained within the line of the plat first herein referred to, being the western part of the survey aforesaid, in right of Searcy. In default of making such conveyance as is herein directed to be made, by any of the defendants in this case, then this court doth further order and direct, that a conveyance of the right and title, interest and claim, in and to the land in controversy, held or claimed by such defendants, be conveyed to the com-

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plainants, by a commissioner, to be by the said circuit court appointed to make such conveyance, according to law.

That the bill of complainants be dismissed, as to the heirs of George Boone, Hezekiah Boone, and the heirs of Sonth, with costs. And it is further ordered, adjudged and decreed, that all the equity of the complainants, as to any person or persons, not parties to this suit, or as to any matter or thing, not herein decreed on, shall be and is hereby reserved to the said complainants, anything contained in this decree notwithstanding; and that the cause be remanded to the circuit court for the district of Kentucky, with instructions to proceed therein according to this decree, and as to justice and equity shall appertain.

*MCLEAN, Justice. (*Dissenting.*)—Under the peculiar circumstances of this case, I am constrained to state, as succinctly, as I can, [*235] the reasons why I dissent from the opinion just delivered.

The facts out of which this controversy arose, are as follows: Reuben Searcy, being entitled to a settlement and pre-emption of 1400 acres of land, in the settlement of Kentucky, on the waters of Licking, employed John Martin, for one-half the land, to perfect the title. On the 24th September 1781, for a valuable consideration, Searcy sold 700 acres of this land to William Hoy; executed his bond for a title; and at the same time, assigned to Hoy the plat and certificate of survey, which enabled him, in 1785, to obtain a patent for the whole tract, in his own name. But before the emanation of the patent, in the month of December 1781, William Hoy assigned Searcy's bond to George Boone, and himself, his heirs, &c., as sureties, &c. And on the 30th April 1783, George Boone assigned the bond to Thomas Boone, whose heirs prosecute this suit.

Thomas Boone, being a citizen of Pennsylvania, gave a power of attorney to George Boone, of Kentucky, dated 1st October 1787, which authorized him, in the name of Thomas Boone, and for his use, "to ask, demand, sue for and recover, of and from Major William Hoy, of Kentucky settlement, a deed or other lawful conveyance, valid in law, for 700 acres of land, in or near the waters of Hinkson and Stoner, &c.; and the attorney was authorized to appoint, &c., and to do everything necessary in the premises," &c. On the 6th August 1792, George Boone, as the attorney in fact of Thomas Boone, assigned Searcy's bond to John South, the executor of William Hoy, who bound himself to cause Hoy's heirs to convey, so soon as they should become of age, the 700 acres, to Boone, &c. But on the 23d December 1791, before this assignment, South sold 400 acres of the land to Peter Smeltzer, and bound himself, with Walter Carr and John Glover, in the penalty of 1000*l.*, to make a deed for the same, as soon as the heirs of William Hoy, who was then deceased, should become of age. And on the 28th *August 1794, South sold 200 acres of the same tract to George Pope, and bound himself in the penalty of 500*l.*, to make a deed, when Hoy's heirs should all arrive at full age. This last bond, in the spring of 1798, was purchased by, and assigned to Nicholas Smith, who shortly afterwards purchased from South the residue of the tract, supposed to contain sixty or seventy acres.

On the 30th November 1802, Thomas Boone made an agreement with his uncle, Hezekiah Boone, of the state of Tennessee, to sell to him the whole

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of this tract of land, for 700*l.* But Hezekiah Boone and his heirs had the option of taking the land or not, within four years from the time of the contract ; and the contract was to be binding, if he should make known his determination to take the land, and pay for it within the four years. But there is no evidence, that Hezekiah Boone made known his determination, within the time limited, to take the land ; or that he has, at any time, paid the whole, or any part, of the consideration.

On the 30th October 1817, Hezekiah Boone, and George Boone, as attorney for Thomas, entered into an agreement with William Chiles, and delivered to him the papers they held respecting the above land ; and Chiles was to have the free use of them, for the purpose of coercing the title to the land, if it could be recovered ; and if not, he was to obtain the value. And Chiles was to use diligence in recovering the money or obtaining the title ; and the proceeds of the suit, whether land or money, were to be divided between Chiles and Hezekiah Boone. Shortly after this contract was entered into, Chiles, having obtained from George Boone the bond given him by South, which bound him to convey the land to Thomas Boone, as soon as Hoy's heirs could be compelled to make a deed, called on Peter Smeltzer's heirs, who held the bond of South, Carr and Glover, and representing to them that he was the rightful owner of the land, obtained the bond ; and also, he obtained the bond for the 200 acres given by South to Pope, and by him assigned to Smith ; which bonds he delivered to Benjamin South, the executor of John South, who was deceased ; together *with the bond
*237] given to George Boone, by the deceased ; and obtained from the executor, possession of Searcy's bond and the assignments. The assignment of George Boone, as the attorney of Thomas, was then erased ; and the contract between South and the tenants was cancelled. And the purchasers under South, purchased the land from Chiles, and bound themselves to pay for it ten dollars per acre.

At the August term of the Bourbon circuit court, in the year 1818, Chiles brought an action of ejectment, in the name of Hoy's heirs, to recover possession of the land. The tenants having been served with notice, appeared and defended the suit ; but a verdict was found against them, and a judgment was entered on the verdict. On the 26th January 1818, Chiles filed a bill in the Bourbon circuit court in the name of himself, Hezekiah Boone, George Boone and Thomas Boone, against the heirs of Hoy, for a title. In this bill, Chiles stated that William Hoy, and John Sappington and Parthenia his wife, late Parthenia Hoy, had conveyed their interest to him. And he sets up the contract with Hezekiah Boone, as the ground for a decree in his favor, under Searcy's bond, and the assignments made thereon. The assignment by George Boone to South, is represented as inoperative and void, as George Boone had no power, as the attorney of Thomas Boone, to sell or transfer the title to the land. The heirs of Hoy and others who were made defendants, answered the bill. And afterwards, at August term 1821, the court decreed that the complainant, William Chiles, was entitled to a specific execution of the contract from Hoy's heirs ; and that, if the defendants did not execute a conveyance in pursuance of the decree, on or before a time specified, then, that Thomas P. Smith, as commissioner, under the statute of Kentucky, should execute it. And afterwards, on the 7th January 1822, the heirs of Hoy not having executed a conveyance for the land,

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in pursuance of the decree, the deed was executed in due form by the commissioner. In April 1827, this decree of the Bourbon circuit court, was brought before the court of appeals of Kentucky, and reversed, *for want of proper parties ; and the cause was remanded to the circuit [*238 court for further proceedings.

The heirs of Thomas Boone filed their bill in the circuit court of the United States, on the 25th January 1828, at first, against Chiles, Hezekiah Boone, George Boone, and the tenants who occupied the land ; and represented that the bill filed by Chiles, in the name of Thomas Boone and others, against the heirs of Hoy, was a fraudulent proceeding ; and as Chiles, under the decree, was supposed to be invested with the legal title, a decree for the title was prayed against him. And after the reversal of the decree of the Bourbon circuit court, such of the heirs of Hoy as were found within the jurisdiction of the court, were made parties. The tenants answered, and relied upon lapse of time, their purchase under South, and the fraud of Chiles, in their defence. Chiles also filed his answer, setting up his title, and also Fanny Hoy and Jones Hoy, the only heirs of Hoy who were made parties to the bill, who admitted the right of the complainants. The material parts of the answers will be noticed more particularly, under the appropriate points which arise for consideration.

There seems to be no question as to the genuineness of Searcy's bond, and the assignments made upon it ; but it is insisted, that Searcy should have been made a party. The bill asks no decree against Searcy. By the assignment of the plot and certificate, he enabled William Hoy to obtain the patent in his own name ; and this was equivalent to a conveyance of the land, in discharge of the bond. Hoy, therefore, could have no demand upon Searcy, and of course, the assignee of Hoy could have none against him ; he was, therefore, not a necessary party. The complainants, under the assignment of Hoy, pray a divestiture of the title from his heirs ; and as between these parties, there can be no doubt of the equity of the complainants. Indeed, the heirs of Hoy do not controvert the right of the complainants.

In the argument, it was insisted, that the 700 acres claimed by the complainants, are not so specifically described in *the bill, as to enable [*239 the court to decree, in pursuance of the prayer, a specific conveyance. William Hoy obtained, in his own name, a patent for the 1400 acres ; and it appears, there is a surplus of more than 500 acres. The bond of Searcy to Hoy was 700 acres, and Hoy was to take his first choice out of the whole tract ; and it appears, that there does not remain of the entire tract, undisposed of, or not covered by paramount claims, more than will satisfy the above bond. And in addition to this consideration, the heirs of Hoy may be safely decreed to convey an undivided interest in the land, to the extent of the complainants' right : and, if necessary, the complainants, under such a decree, being tenants in common with the heirs of Hoy, or those who hold an interest in the land, could have partition made. There is no want of certainty as to the identity of the entire tract.

As to the claim of Chiles, except under the deed of Newland and wife, I admit, that it cannot be sustained. Hezekiah Boone, who sold to Chiles, had no interest to transfer ; his contract with Thomas Boone was a conditional one, and the conditions were not performed ; no part of the considera-

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tion was ever paid, nor did Hezekiah Boone signify his determination to take the land, within the four years limited ; and failing to do this, the contract, upon its face, was not to be binding. The assent which George Boone, as attorney in fact for Thomas Boone, gave to the contract, made between Chiles and Hezekiah Boone, was an extraordinary procedure on his part ; and it is sufficient to say, that he had no power to sell the land, much less to consent that Chiles and Hezekiah Boone should divide between them the land or the money, whichever should be recovered. George Boone, as the attorney of Thomas, had power to authorize Chiles to act as attorney or agent in endeavoring to recover the land ; but he had no power to dispose of it in any manner.

As Chiles, by virtue of his contract with Hezekiah Boone, obtained conveyances of the interest of William Hoy and Parthenia Sappington, wife [240] of John Sappington, two of the heirs of Hoy, *he must, under the circumstances, be considered as holding the land in trust for those who have the better equity. In no sense, can Chiles be considered as a purchaser of this interest, without notice, and for a valuable consideration. But the interest of Newland and wife, which was conveyed to him through Green Clay, rests upon different principles. In my opinion, Chiles must hold this interest, as a purchaser from Clay, who was a purchaser from Newland and wife, without notice of the complainant's equity. A majority of the judges reject the right asserted under this deed, because the allegation that Clay was a purchaser for a valuable consideration and without notice, is not made with the requisite precision in the pleadings, to admit proof of the fact ; and also, because the deed to Green Clay conveys to him no title.

And first, as to the allegations contained in the pleadings. In his answer to the complainant's bill, Chiles states, that "he admits a certain Green Clay bought and received the title of John Newland and wife ; and discovering this to be the fact, he caused the said Green Clay to be made a party to the bill in the Bourbon circuit court, charging him to be a guilty purchaser, knowing of the equity arising from the bond of Hoy. But said Clay put in his answer denying notice ; and this defendant not knowing evidence to prove notice, bought of him his share and paid him therefor, and received his conveyance. This defendant refers to the answer of Clay in the Bourbon circuit court, as part of this answer ; and this defendant insists, that Clay was an innocent purchaser for a valuable consideration, without notice, till his purchase was complete." The answer of Clay in the Bourbon circuit court, and which is referred to by Chiles, and made a part of his answer, is as follows : "This respondent further saith, that it is not true, that to increase the difficulties of the complainant (Chiles), as charged in said bill, John Newland and wife conveyed their interest to the lands in controversy to this defendant, &c. ; but, on the contrary, this respondent avers, that the contract he made with John Newland and Celia his wife, was a *bond fide* contract, in good faith, for a valuable consideration paid them, [241] without notice, *or even a knowledge that the complainant, Chiles, had, or any of the other complainants, any claim on said land ; but on the contrary, this defendant has been informed and believes verily, that the claim of the complainant Chiles, is founded in fraud and imposition," &c. ; and "as to the contract between this respondent and John Newland

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and wife, it is committed to record, and will speak for itself; and this respondent believes the complainant Chiles has misrepresented the true meaning thereof."

Although the averments in the bill, filed by Chiles, on this point, in the Bourbon circuit court, and the answer of Newland and wife, in the present case, have no connection with the answer of Chiles under consideration; yet I will refer to them, as they have been thought to have some influence in the case. In his original bill filed against Clay and others, in the Bourbon circuit court, Chiles alleges, that, "to increase the difficulty, the said John Newland and Celia, his wife, have conveyed their interest in said tract, with others, to a certain Green Clay, who, your orators charge, had full knowledge of your orators' claim; and, as they are informed and believe, executed a contract with said Newland and wife, when he received their conveyance, binding himself to make good all the contracts of their ancestor; but yet the said Green Clay refuses to convey to your orator, William Chiles." And Newland and wife answer to the bill in the present case, "that Celia is a daughter of Hoy, and that if ever they had an interest in the land mentioned in the said bills, and now in contest herein, that they have long since transferred their interest therein, by a writing amounting to a quit-claim, to Green Clay; but they never conveyed the title, by deed, to him or any one else." The answer of Newland and wife cannot be read in evidence against Chiles, a co-defendant. If this answer, in every respect, were in accordance with the most technical forms, it could not aid a defective averment in the answer of Chiles; nor can its defects, in any respect, have an unfavorable bearing on that answer. It must rest upon its own language, equally unaffected *by the answer of Newland and wife, [*242 and the original bill filed by Chiles in the Bourbon circuit court.

As regards the sufficiency of the answer of Chiles to protect himself under the title of Clay, who is alleged to be an innocent purchaser for a valuable consideration, and without notice, it may be remarked, that no exceptions were taken to the answer; but a general replication was filed, or considered as filed. In the case of *Harris v. Ingledew*, 3 P. Wms. 95, it is said, that "notice and fraud must also be denied generally, by way of averment in the plea, otherwise, the fact of notice or of fraud will not be in issue. That, where a defendant, in his plea of a purchase for a valuable consideration, omits to deny notice, if the plaintiff replies to it, all the defendant has to do is to prove his purchase; and it is not material, if the plaintiff proves notice, for it was the plaintiff's own fault, that he did not set down the plea to be argued, in which case, it would have been overruled."

But independent of this consideration, what will constitute a good plea, by Chiles, to protect this purchase under Clay? It must appear, that the persons who made the conveyance to Green Clay were seised of the land; that they conveyed by deed to him, and for a valuable consideration, which was paid, and the deed executed, before notice of the complainant's equity. Mitf. Plead. 275; Hinde 180; 3 P. Wms. 281; 1 Vern. 179. Are not these facts found substantially in the answer of Chiles? It sufficiently appears, that Newland and wife were seised; for they are stated to be the heirs of Hoy, in part, to whom the land descended, or was devised. And Chiles avers, that "Clay was an innocent purchaser, for a valuable consideration,

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without notice, until his purchase was complete." His purchase could not be complete, in the sense here expressed, until the consideration was paid, and the deed executed ; if this be the clear meaning of the allegation, it must be held sufficient. But the averments in the answer of Green Clay, are made a part of the answer of Chiles.

It must be admitted, that this answer of Clay is loosely drawn, and without much regard to the forms of pleading. But although *Clay speaks [243] of his contract with Newland and wife, it is clear, that he refers to a deed of conveyance, as he states it has been recorded ; and to use his language, it will speak for itself. And he avers, that his purchase from Newland and wife was *bond fide*, for a valuable consideration, and without notice. Now, when these allegations are incorporated with those contained in the answer of Chiles ; and the fact, that there was no exception to the answer, are considered ; I am inclined to think, that the allegations should be considered sufficient to protect the title asserted. The amount of the consideration paid is not specifically stated, but the averment is general, that a valuable consideration was paid, and that before notice.

It must be admitted, that the allegations in the answer of Chiles, in relation to this purchase, are not made with technical precision ; and if exceptions had been taken to this part of the answer, they might have been sustained. But the complainants having failed to except, ought not now to insist, and indeed, cannot, on the same degree of strictness as to form, as if they had done so. If this were admitted, the defendant would be taken by surprise, and the ends of justice might be defeated. To guard against this, the forms of pleading require exceptions to be taken to matters set up in the defendant's answer in bar of the plaintiffs' right. If exceptions be waived, and an issue taken on the answer, the complainants cannot object to the matter in bar, on the ground of the insufficiency of the plea or answer. If Clay was a purchaser without notice, Chiles may shelter himself under a deed from Clay. The estate having been innocently and fairly acquired, and for a valuable consideration, can be conveyed to a person with notice. 1 Atk. 571 ; 2 Ibid. 139, 242 ; 2 Eq. Cas. Abr. 685 ; 13 Ves. 120 ; Prec. Ch. 51. That a decree was loosely entered against Clay in the Bourbon court, is of no importance, as that decree has been annulled.

If the objection as to the sufficiency of the answer of Chiles, under the circumstances, cannot now be insisted on by the complainants ; it becomes important to examine the deed from Newland and wife to Green Clay, and to determine the effect of that conveyance. I will transcribe the operative words of the deed. "This *indenture, made this 23d day of May, [244] in the year 1814, between John Newland and Celia his wife, of the county of Madison, and state of Kentucky, of the one part, and Green Clay, of the same county, and state aforesaid, of the other part, witnesseth : that the said John Newland and Celia his wife, for and in consideration of the sum of one hundred dollars, to them in hand paid, the receipt whereof, &c., have granted, bargained and sold, and do, by these presents, grant, bargain and sell, and convey to the said Green Clay, his heirs and assigns for ever, all the right, title, claim and interest which they, the said John Newland and Celia his wife have, in and to the real and personal estate of William Hoy, deceased ; and all debts, dues and demands, rents and profits, either in law or equity, to which they are or shall be entitled, as one of the heirs and

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legatees of the said William Hoy deceased ; she, the said Celia Newland, wife of the said John Newland, late Celia Hoy, being one of the children and legatees of the said William Hoy, deceased." To this, covenants of special warranty are added, and also of further assurances, &c. Can any doubt exist, that this deed conveys to Green Clay what it purported to convey to him, all the right and title, &c., of the grantors to the real estate of William Hoy, deceased. Celia Newland, under the will of her father, received a certain interest in her father's real estate, and this interest she conveyed by the above deed.

It is true, that Newland and wife, under the will of William Hoy, could receive nothing more than the legal title, their ancestor having, in his lifetime, sold or conveyed the equitable title. But having the legal estate, does any one doubt, that they could convey, and did convey, to Green Clay, a clear title to the land, if he was a *bona fide* purchaser, without notice, and for a valuable consideration. That Clay was a purchaser of this description is averred, and there are no facts in the case which disprove the averment ; and in all such cases, the proof of notice or fraud rests with him at whose instance the title is impeached. The deed of Newland and wife describes with sufficient certainty the interest conveyed ; it was the interest which Celia *Newland received under the will of her father. This conveyance, containing all the operative words necessary to convey an [*245 estate in fee, and also describing with the requisite certainty the interest conveyed, must be considered as an operative and valid conveyance in the hands of Clay ; who, as before stated, was a purchaser without notice, and for a valuable consideration. I think, therefore, that Chiles, without reference to his knowledge of the facts or his conduct, should be considered as holding this interest against the equity asserted by the complainants.

The counsel for the complainants insisted, that, under the decree of the Bourbon circuit court, Chiles was invested with the legal estate in the land ; and that the legal title, under the deed of the commissioner, still remains in him, notwithstanding the reversal of the decree by the court of appeals. The decree of reversal, by the court of appeals, does not require this deed to be cancelled ; nor, in my opinion, was it necessary to annul it. The deed of the commissioner is inseparably connected with the decree ; indeed, it is a part of the decree ; and must have the same effect as if the statute of the state had provided that a decree should operate as a conveyance. In this respect, the deed is different from a deed executed by a sheriff, on a sale in execution, or perhaps a sale under a decree in chancery. A reversal of the judgment does not invalidate the sheriff's deed ; but a reversal of the decree must destroy the effect of the commissioner's deed ; as in no sense can he be considered as the agent of the party, but as an officer of the court, and as acting strictly under its authority. He does not, as a purchaser under an execution, pay money on the faith of the sale. The title passes by this deed ; but if the decree, which is the authority of the commissioner, be reversed, the deed must fall with it.

That this is the view taken of the commissioner's deed, in Kentucky, is shown by the proceedings in all cases of reversal. The decree of Chiles was reversed, and the case was sent down to the Bourbon chancery court, with instructions to amend the bill, and to have further proceedings. And I presume the cause *is still pending in that court, and Chiles is [*246

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praying for a title for the lands embraced by the commissioner's deed. In the case of *Watts v. Waddle*, 6 Pet. 400, the court says "the deed executed by the commissioner in this case, must be considered as forming a part of the proceedings in the court of chancery ; and no greater effect can be given to it, than if the decree itself, by statute, was made to operate as a conveyance in Kentucky, as it does in Ohio."

The right set up by the present occupants of the land, against that which is asserted by the complainants, is the next point for consideration. I shall examine this point with some minuteness, as I cannot assent to the decision made by my brother judges.

Smeltzer, it is proved, took possession of the 400 acres he purchased from South, in 1791 ; and he, or those claiming under him, have been in the possession ever since. And it is proved, that Smith took possession of his purchase of 200 acres, in 1798, and the additional purchase of 50 acres, shortly afterwards ; and he, or those claiming under him, have held possession to this time. The first question that arises in this, and all similar inquiries, is, whether the possession of the occupants was adverse to the title asserted by the complainants. If the title of the tenants was not adverse, the statute of limitations cannot operate ; nor can we, by analogy, apply the principles of the statute in the case.

The title set up by these defendants is under South, who claimed under an assignment of Searcy's bond by George Boone, as the attorney of Thomas Boone, the ancestor of the complainants. This assignment by George Boone was not authorized by the power of attorney under which he acted. That power authorized George Boone "to ask, demand, sue for and recover, of and from William Hoy, a deed or other lawful conveyance, valid in law," for the land ; but he had no power to sell or convey the title. This act was void, as to Thomas Boone. In no respect could it prejudice his right ; for South, taking the assignment, was bound to look to the authority under which it was made. In the case of *Hawkins v. Page's Heirs*, 4 T. B. Monr.

*138, the court of appeals say, "the only plausible objection that can be raised to these conclusions is, that the possession of twenty years, and upwards, would give a legal estate to the possessor under the equity, notwithstanding the legal title remained in another. This doctrine cannot be maintained. So long as the holder of the equity looked to the legal title-holder for the legal estate, he must be considered as holding under him ; and the length of possession inures to the benefit of the legal estate, as against adverse claimants, but did not give the legal estate to the equitable possessor ; as between these two, the legal title-holder and the equitable possessor, and by continuing under these circumstances, lapse of time could be no bar, and could not transfer the right of entry to the possessor." And in the case of *Gay v. Moffitt*, 2 Bibb 507, the court say, "where one claims under or through the other, there shall be no adverse possession in such case, sufficient to give a title." And again, in the same case, page 508, "if, therefore, we consider the appellant as having no other title than that derived from possession, and that his possession has been changed from an adverse hostile, into a friendly, possession, it follows, that the statute of limitation does not apply to his case." And in 5 Litt. 318, it has been laid down, that "a holding of land under a bond from the patentee, cannot be considered as adverse thereto." Other decisions in Kentucky, to the same import,

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might be cited, but it is unnecessary. That the rule established in Kentucky must govern the question under consideration, is admitted; although such rule be different from the general law on the subject. It is, then, well settled in Kentucky, that a purchaser who enters under a contract, looking to the person in whom the fee is vested for the perfection of his title, does not hold adversely to the legal title.

The legal title to the land in controversy was in the heirs of Hoy; of course, the possession or title of the tenants could not be adverse to them. And is it not equally clear, that as the tenants set up a title under an assignment of Thomas Boone, and claim through him, their title is not adverse to his? and consequently, their possession is not adverse. Their title, as asserted, *can be of no validity, unless the equity of Thomas Boone, from Hoy, shall be established. They claim under and [*248 through Thomas Boone, and not in hostility to him. Their possession, therefore, so far as it rests upon a claim of title, is in no sense hostile to the legal interest of Hoy's heirs, nor the equitable interests of Thomas Boone. Under such circumstances, no length of time would enable the tenants, as against Hoy's heirs, to set up the statute of limitation. So fully is this rule established in Kentucky, that when Chiles prosecuted an action of ejectment, in the name of Hoy's heirs, in the Bourbon circuit court, against the tenants, they did not rely on the statute.

I do not insist, that the parties in this case are so situated, that lapse of time can have no effect upon their rights; but it is clear, that, on the part of the tenants, the statute of limitations cannot be set up as a bar, in an action at law; and by consequence, it cannot be applied, by analogy, as a bar in equity. The rule of the statute, in chancery, is adopted, on the ground that equity follows the law; and where the law fails, the rule in equity must also fail. A court of chancery is said to act on its own rules, in regard to stale demands, and independent of the statute. It will refuse to give relief, where a party has long slept upon his rights; and where the possession of the property claimed has been held in good faith, without disturbance, and has greatly increased in value. But in such a case, the court will give due weight to all the circumstances connected with the claim of title or possession, and the effect of the lapse of time may be obviated by a great variety of facts and circumstances; which, however, would be unavailable to the complainants, where the statute would bar.

I will now examine the equity of the tenants, in regard to the lapse of time. It will be observed, that they set up a purchase under John South, the executor of William Hoy, in 1791, when South had no pretence or color of title to the land, except as having married one of the legatees of Hoy; and through her he could claim *only a naked legal title, the equity having been transferred by Hoy in his lifetime. And afterwards, in [*249 1792, when South obtained the assignment of Searcy's bond, by George Boone, as the attorney of Thomas Boone, the assignment was inoperative, for want of power in the attorney. This assignment, upon its face, would direct every person who claimed any interest under it, to the authority by which George Boone acted.

Had Smeltzer and Smith, the first purchasers, notice of this defect in the assignment to South? In his deposition, Nicholas Smith says, "that he bought a bond of John South, in 1798, for 200 acres of land, out of the tract in controversy; and that, shortly after, he purchased from South the residue

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of the tract, supposed to be sixty or seventy acres, after satisfying Smeltzer's purchase of 400 acres. And at the same time, he lent South \$300, which sum was to go as payment for the land ; and if that sum overrun, he was to pay back, and if it fell short, the witness was to pay the balance. He took possession of the land, and has ever since held it, under this purchase ; but he afterwards found out that South had no right to sell the land, and brought suit against him, and recovered back the \$300." The time that Smith ascertained that South had no right to sell the land does not appear ; but the facts stated authorize the inference, that this knowledge was acquired by Smith, not long subsequent to the purchase. Some time before 1809, it appears, South was very much embarrassed, and in that year was confined as a lunatic. The suit of Smith must have been brought, before South's extreme embarrassment, as the money was recovered from him, and in all probability, the money was repaid to Smith, within five, or at most, six years of his purchase.

Barbara Smeltzer, the wife of Peter Smeltzer, who purchased the 400 acre tract, states in her deposition, that her husband made the purchase of South &c., who claimed the same under the bond from Reuben Searcy to William Hoy, and assigned by Hoy to George Boone ; that, at the time they first settled, John South represented to her husband, that he had traded

*for the said bond, but that they afterwards found out he had not
*250] got the bond, but soon afterwards he obtained it from George Boone. John Walton, a witness, states, that he acted as one of the commissioners to divide the land, agreeable to the will of Peter Smeltzer, deceased, about the year 1805 or 1806 ; and that there was conversation at that time, among the heirs of Smeltzer, about South and Hoy's bond," &c. Joseph Steele, a witness, states, that he was informed by George Boone, that Smeltzer had notice, before he purchased the land from South, that it belonged to Thomas Boone. This statement seems not to have been objected to, in the circuit court. James Robinson, a witness, being present when the deposition of Barbara Smeltzer was taken, was astonished to find that a person of her age should describe so accurately Searcy's bond to Hoy, as to its date, the land called for, &c. Benjamin Mills, an attorney-at-law, who was sworn as a witness, states, in 1826, that many years before, Peter Smith, and either John or Jacob Smeltzer, and perhaps Nicholas Smith, applied to him to bring suit for the legal title of the land, and especially for that part described in the bond signed by South, Carr and Glover ; but on examining the title, although the witness declines making some statements, on account of professional confidence, yet he says, substantially, he considered the title wholly defective, under the assignment of South ; and for that reason declined bringing the suit. As the witness left the bar for the bench, in 1818, and as he speaks of the bond of South, Carr and Glover, which was given up, in 1817, to Chiles, this conversation must have been prior to that time, and probably, was several years before it.

But in 1817, Smith, and the heirs of Smeltzer, surrendered to Chiles the bonds they held on South for the land, and bought the land of Chiles, agreeing to pay him for it ten dollars per acre. Chiles having possession of the bonds of South, who was then deceased, rescinded the contract with
*251] his executor, gave up *South's bonds for the land, and received

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from the executor Searcy's bond, after the erasure of the assignment by George Boone, as the attorney of Thomas, to South.

Judge Mills, while at the bar, brought an action of ejectment in the name of Hoy's heirs, to recover possession of this land; but it was dismissed for want of prosecution. Afterwards, in the year 1817, he brought a second ejectment, which was served on the tenants; against whom a final judgment was obtained, by the verdict of a jury, defence being made, in 1818. To open a judgment by default in this cause, Nicholas Smith and Jacob Smeltzer swore, that "they had no expectation that William Chiles would have prosecuted the suit to judgment against them, as they had purchased from him the title of Hoy's heirs, for the sum of \$6000, \$900 of which sum they had paid to him, and that the balance was not then due. They stated, they held Chiles's bond to convey to them Hoy's title, and that when the compromise was made, the suit was not to be prosecuted, &c.

In 1820 or 1821, George W. Baylor purchased the interest of Peter Smeltzer's devisees in the tract of land in controversy; and on the 25th of August 1821, received a conveyance for one-third of the tract from Anna Maria Smeltzer and her husband. The consideration named in the deed is \$900, and the grantors only convey their right, title and interest, and warrant against themselves and all persons claiming under them. And for the residue of the tract, Baylor holds the bonds of John and Jacob Smeltzer; but what consideration was paid or contracted to be paid, does not appear. George W. Baylor having died shortly after the commencement of this suit, it has been carried on against his heirs, who are made parties. The heirs of Cummings, who are defendants, seem not to be entitled to any part of this land. It then appears, that the heirs and assignees of Nicholas Smith, and the heirs of Baylor, are the tenants, and the only persons who rely upon the lapse of time and the length of possession to protect them in this case.

James Hutchins, a witness, swears, that George W. Baylor took possession of the land in dispute, some time in April 1823. *That he does not remember, whether he heard Baylor say anything particularly [**252 about Boone's claim, before he moved to the land. But the witness states, after Boon Engles's return from Pennsylvania, in 1822, he heard him tell Baylor that he was authorized to investigate Boone's claim, and that he would have the land. And William Burr, a witness, says, "before Engles went to Pennsylvania, he heard him and Baylor have some conversation about the claim of Thomas Boone to the land now in contest. The deponent has not a distinct recollection of what was said, but is under the impression, Baylor spoke of an intention to purchase Smeltzer's land, and that Engles advised him not to do it, because the land belonged to Thomas Boone. He also thinks, that Baylor and Engles had some conversation about forming a partnership in the investigation of Boone's claim." He says, after Engles's return from Pennsylvania, and before Baylor had removed to the land, Engles and he had different conversations respecting Boone's title."

These are the leading facts on which the heirs of Baylor and Smith claim protection of a court of chancery, from the lapse of time, and the equitable circumstances of the case. In the first place, they claim under the same title as the complainants, and not in hostility to it. South had no

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right, under the assignment of George Boone; and there is no evidence that the purchase-money was paid by Smeltzer, or his heirs, to South; and the amount paid by Nicholas Smith was sued for and recovered from South, after it was known that he had no title to the land. And this must have been within a very few years after the purchase of Smith, not exceeding ten years, and perhaps less than five. That Smeltzer had notice of the want of title in South, is certain, from the depositions of his widow Barbara Smeltzer, and Joseph Steele. The states, that when South sold to them the land, he had not the bond of Searcy, but that he afterwards obtained it. With accuracy, she detailed the substance of the bond, its date, and the assignments. Smeltzer, therefore, as she states, was well acquainted with the fraud of South, in selling the land, *before he *253] had a title, and this should have put Smeltzer on his guard. He was, no doubt, as well acquainted with Searcy's bond as his wife, and the assignment of George Boone was evidence, upon its face, that unless he acted under a power from Thomas Boone, the assignment was void. An action of ejectment was commenced, in the name of Hoy's heirs, to recover possession of the land, which was afterwards discontinued. And afterwards, in 1817, when Chiles, under his purchase of Hezekiah Boone, and having the sanction of George Boone, the attorney of Thomas Boone, to investigate the title, the tenants surrendered the bonds they had on South, although security was given in the one held by Smeltzer's heirs to Chiles, who cancelled the contract with South, and sold the land to the tenants. It is true, this contract of Chiles is represented to have been obtained by fraud; but the payment made under it, and the use made of it to set aside a judgment by default in the ejectment suit, show that they had wholly abandoned the claim of title under South.

And as regards Baylor's heirs, they were in possession only one or two years before the commencement of this suit; and their ancestor purchased nothing more than the right of Anna Maria Smeltzer, one of the legatees of Peter Smeltzer, with only a special warranty, and of John and Jacob Smeltzer, the other legatees of the land in dispute; and the inference is authorized, that the same interest, and no more, was to be conveyed under the title-bonds, and this, with a full knowledge of the complainant's equity, and of the total defect of title in the legatees. Can a right thus acquired and asserted be protected by lapse of time? Does it come within that salutary rule, which has been adopted to preserve the peace of society, and protect rights long acquired and enjoyed without interruption, against stale demands? Did not Baylor purchase the interests of Smeltzer's legatees on speculation? Knowing the title of the legatees to be defective, or rather to have no foundation on which it could be sustained, did he not purchase it; and, under such circumstances, how can the lapse of time aid him? If this principle might have been invoked by Smeltzer's legatees, is the same right *254] transferred to Baylor, who *purchases the interest of the legatees, without a general warranty, and for a valuable consideration? This appears to me to have been a purchase that does not draw after it the equitable considerations which were connected with the title of Smeltzer's legatees; and if it did, I am not prepared, under the circumstances, to say, that it is entitled to the protection of a court of chancery. It appears to me, that the purchase was made with more reference to the value of the improvements

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than the title of the tenants ; and under the expectation that, if the land should be lost, compensation for the improvements would reimburse the purchase-money.

And as regards the title of those who claim under Nicholas Smith, it seems not to require a much more favorable consideration. The money proved to have been paid by Smith, on the purchase from South, was recovered back again ; and the heirs abandoned the claim under South, and purchased from Chiles. He purchased fifty acres of Jones, which is covered by Flournoy's patent ; and he is protected, under the statute of limitations, to this extent.

I have looked through the cases decided in this country and in England, and I can find no instance, where lapse of time, under circumstances analogous to those which belong to this case, has been held sufficient to protect the possession against a clear equitable title. The presumptions in favor of the tenants, which might arise from lapse of time, are repelled by the facts and circumstances of the case. These must always be regarded as controlling mere lapse of time ; and they are such, in this case, as to convince me, that to protect the rights set up by the tenants, would sanction a new rule, and one that would be dangerous to *bona fide* claimants. I am, therefore, of the opinion, that time, which cures many imperfections in a meritorious title, and often authorizes the presumption of title where none in fact, exists, cannot protect the tenants in this case.

That the complainants should be decreed to release their interest to the tenants, under the contract they made with Chiles, is, to me, a most extraordinary result of the controversy. I *cannot give my sanction to [*255] the principles on which it rests. If the decree enforces this contract, then must lapse of time be abandoned ; for the contract bears date only five or six years before this suit was instituted ; and on what principles such a decree can be made, in the relation which the parties bear to each other in the suit, and in the present state of the pleadings, I am unable to comprehend.

This contract is declared by the tenants to be fraudulent ; and they have refused, by their whole proceedings in this suit, to be bound by it. They have invoked the aid of a court of chancery to annul and set aside this contract ; and, I believe, have taken steps to recover back from Chiles the money they had paid him on it. But this contract is not only declared by the tenants to be fraudulent and void ; the complainants also denounce it as fraudulent. It finds favor in the eyes of no one but Chiles. And yet, this contract, thus treated by the complainants and defendants, and made by Chiles without a color of right, is made the basis of a decree of this court, which takes from the complainants, and gives to the defendants, a large estate. Chiles, though the fraudulent instrument in making this contract, is not permitted to enjoy any advantages under it.

If the complainants had adopted this contract ; if they, in any manner, had sanctioned the contract, by treating Chiles as their agent in selling the land, there would be some ground to decree a specific execution of it. But the complainants have not sanctioned the conduct of Chiles in making this contract ; and so far from seeking anything under it, have declared it to be fraudulent and void : and yet, in despite of them, it is made the rule by

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which their rights are decided. I am altogether opposed to the decree, on this ground.

As the decree of the circuit court is reversed, it cannot be necessary to say anything respecting the decree which was made respecting the rents and profits. It will be found, however, that Hoy had eight heirs; two of whom, Fanny Hoy and Jones Hoy, were defendants in the suit; and that Chiles had received conveyances from two of the heirs, besides Newland and *256] *wife. And as Chiles was decreed to convey his interest, and the two heirs of Hoy, who were defendants, were decreed to convey also under this decree; the complainants became vested with four-eighths of the land, and he was made accountable to pay for that proportion of the improvements, and in the same proportion was held entitled to the rents. Elizabeth South, whose deed is in the record, is not a party to the suit, and the court could not act on her interest.

Decree as above stated.

*257] *SAMUEL SPEIGG, Plaintiff in error, v. BANK OF MOUNT PLEASANT.

Principal and surety.—Estoppel.—Pleading.—Demurrer.

The plaintiff in error, with others, executed to the Bank of Mount Pleasant, a sealed obligation for the payment of the sum of \$2100, at the expiration of sixty days; and in the instrument, each of the parties to it acknowledged himself bound as principal. The money was loaned on the instrument, to and for the exclusive benefit of one of the parties to it; and after the time of payment arrived, the bank gave a further credit to the borrower; receiving from him the discount for the extension of payment; no notice was given to the other parties of this fact. The amount loaned not having been repaid, this suit was instituted on the obligation; and the defendant pleaded several pleas, alleging he was discharged from all liability under the obligation; the plaintiff replied, that each of the obligors having acknowledged himself as principal in the instrument, all were estopped from setting up any defence in opposition thereto.

This case is to be governed by rules applicable to proceedings in courts of law; and upon this point, the rule seems to be well settled, that when principal and surety are bound, jointly and severally, in a bond, although there is no express admission on the face of the instrument that all are principals, yet the surety cannot aver by pleading, that he is surety only.

When one who is, in reality, only surety is willing to place himself in the situation of principal, by expressly declaring upon his contract, that he binds himself as such, there cannot be any hardship in holding him to the character in which he assumes to place himself; as to that particular contract, he undertakes as a partner with the debtor; and has no more right to disclaim the character of principal, than the creditor has to treat him as principal, if he had set out in the obligation, that he was only surety.

In this case, the fact of the defendant's being surety is not only admitted, but it is alleged, that he is estopped from setting it up, by his own admission in his obligation, that he is principal; and we are not aware of any case giving countenance to such a defence at law, under such circumstances.

It is an established rule in demurrer, that although the pleading demurred to may be defective, the court will give judgment against the party whose pleading was first defective in substance. It is the settled rule of law, in relation to sureties, that extending to principals further time of payment will discharge the surety.

Bank of Mount Pleasant v. Sprigg, 1 McLean 178, affirmed.

EXEOR to the Circuit Court of Ohio.—The defendant in error instituted, in the circuit court, an action of debt, on the following obligation, executed by the plaintiff in error, and others.

*258] "Know all men by these presents, we, Peter Yarnall & Co., Sam-
uel Sprigg, Richard Symms, Alexander Mitchell and Z. Jacobs, *as

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principals, are jointly and severally held and firmly bound to the president, directors and company of the Bank of Mount Pleasant, for the use of the said Bank of Mount Pleasant, in the just and full sum of 2100 dollars, lawful money of the United States ; to the payment of which sum, well and truly to be made, to the said president, directors and company, for the use aforesaid, within sixty days from the date hereof, we jointly and severally bind ourselves, our heirs, &c., firmly by these presents. Signed with our hands, and sealed with our seals, this 20th of February, A. D. 1826.

PETER YARNALL & Co., [SEAL.]
SAMUEL SPRIGG, [SEAL.]
RICHARD SYMMS, [SEAL.]
ALEXANDER MITCHELL, [SEAL.]
Z. JACOBS." [SEAL.]

To the declaration on this obligation, the defendant pleaded the general issue, and six special pleas. The questions which were discussed and decided by the court, were presented on the second and sixth pleas.

2. The second plea was as follows : And for further plea in this behalf, by leave of the court here for that purpose first had and obtained, according to the form of the statute in such case made and provided, the said Samuel, by his said attorney comes and defends, &c., and says, that the said plaintiffs ought not to have or maintain their action aforesaid against him, because he says, that the president, directors and company of the said Bank of Mount Pleasant constitute an incorporated banking company, located at Mount Pleasant, in the county of Jefferson, in the state of Ohio, doing and transacting business in the usual manner of a bank ; and that the said \$2100, mentioned in the said writing obligatory, was a loan made by the plaintiffs as such banking company, in the ordinary way of making such loans at said bank, to the said Peter Yarnall & Co., and for their accommodation ; and that the said writing obligatory was given to said bank for the sole and only purpose of securing the payment of the said loan, at the expiration of thirty days from the date thereof, and that the said Samuel Sprigg, as also the said Richard Symms, Alexander Mitchell and Z. Jacobs, were, in truth and in fact, securities for the said Peter Yarnell & Co., for the payment of the said loan, in sixty days, as aforesaid, and were so received and treated by the said plaintiffs ; and that the said Peter *Yarnall & Co. received, for their own exclusive benefit and accommodation the entire amount of the said \$2100, and were so entered [*259] and charged on the books of the plaintiffs, in their said bank : and the defendant further avers, that at the time the said writing obligatory became due, to wit, on the 21st day of April, Anno Domini, 1826, the said plaintiffs, for and in consideration of \$22.48, paid by the said Peter Yarnall & Co. to the said plaintiffs, for the discount or interest in advance on the said \$2100, for sixty days then next following, undertook and agreed with the said Peter Yarnall & Co., without the knowledge or consent of the said Samuel Sprigg, Richard Symms, Alexander Mitchell and Z. Jacobs, or either of them, to give a further credit on the said loan, of sixty days, and to extend the time of payment thereof for sixty days, from and after the said 21st day of April last aforesaid ; and the defendant avers, that the said plaintiffs did give to the said Peter Yarnall & Co., the further credit and

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time of payment thereof, for sixty days as aforesaid, and without the knowledge or consent of the said Samuel Sprigg, Richard Symms, Alexander Mitchell and Z. Jacobs, or either of them, and against their will; by means whereof, the said Samuel Sprigg says, that he is discharged from all liability on or by virtue of the said writing obligatory; and this he is ready to verify: wherefore he prays judgment, &c.

6. The sixth plea was: And for further plea in this behalf, by leave of the court here for that purpose first had and obtained, according to the form of the statute, the said Samuel, by his attorney, comes and defends, &c., and says, that the said plaintiffs ought not to have or maintain their aforesaid action against him, because he says, that the said plaintiffs are an incorporated banking company, doing and transacting business in the usual way and manner of banks, and that the said \$2100 mentioned in the said writing obligatory in the plaintiff's declaration described, and of which *oyer* is craved, and the same is set out in the said Samuel's first plea, was a loan made by the said plaintiffs at their banking house, in the town of Moant Pleasant, in the said county of Jefferson, in the usual way of making loans at said bank, to and for the sole benefit and accommodation of Peter Yarnall & Co., the first obligors in said writing obligatory; and that the said writing obligatory was given to the said bank, for the sole and only purpose of securing to said bank the payment of the said loan so made to the said Peter Yarnall & Co. as aforesaid, in sixty days from the date *260] *thereof, and that the said Samuel Sprigg, Richard Symms, Alexander Mitchell and Z. Jacobs were, in truth and in faith, merely securities of the said Peter Yarnall & Co. for the payment of the said loan, in sixty days as aforesaid, and were so received and accepted, and treated throughout by the said plaintiffs, in all the transactions in said bank relating to said loan; and the said Samuel avers, that at the time the said writing obligatory became due, to wit, on the 21st day of April, Anno Domini 1826, the plaintiffs, in consideration of \$22.40, paid to them by the said Peter Yarnall & Co., for the discount or interest in advance on the said \$2100, for sixty days then next following, undertook and agreed with said Peter Yarnall & Co., without the knowledge or consent of the said Samuel Sprigg, Richard Symms, Alexander Mitchell and Z. Jacobs, or either of them, to give, and then and there did give, to the said Peter Yarnall & Co. the further credit and further time of payment of the said loan and the said writing obligatory, for sixty days, from and after the said 21st day of April aforesaid; and the said Samuel further avers, that afterwards, to wit, at the expiration of the said sixty days, further credit and time of payment as aforesaid, and at the expiration of each and every sixty days successively thereafter, until the 24th day of March, Anno Domini 1829, the said plaintiffs did receive at their bank, in the said town of Mount Pleasant, of and from the said Peter Yarnall & Co., the sum of \$22.40, for the discount or interest in advance of the said loan of \$2100, and at each consecutive day of discount, and payment of interest in advance as aforesaid, until the said 24th day of March, Anno Domini 1829; that said plaintiffs did, without the knowledge or consent of the said Samuel Sprigg, Richard Symms, Alexander Mitchell and Z. Jacobs, or either of them, and in consideration of the said sum of \$22.40 so paid to them by the said Peter Yarnall & Co. on each of the said days of discount, and payment of interest in advance as aforesaid,

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agreed with the said Peter Yarnall & Co., to give, and did then and there give, to the said Peter Yarnall & Co., the further credit and time of payment of said loan of sixty days, from and after each consecutive day of discount and payment of interest in advance as aforesaid, until the said 24th day of March aforesaid ; and the said Samuel further avers, that afterwards, to wit, on or about the 24th day of March, Anno Domini 1829, the said Peter Yarnall & Co. failed in business, became insolvent, and unable to pay their just debts, and that the said Samuel Sprigg, Richard Symms, Alexander Mitchell and Z. Jacobs *had not, nor had either of them any notice [*261 of the non-payment of the said loan, or of the outstanding of the said writing obligatory, from the time the same became due, to wit, on the 21st day of April, Anno Domini 1828, until after the failure and bankruptcy of the said Peter Yarnall & Co. as aforesaid ; by reason whereof he, the said Samuel, says, he ought not to be charged with the said debt, or any liability on or by virtue of the said writing obligatory ; all of which he is ready to verify : wherefore, he prays judgment, &c.

To the second and sixth plea the plaintiff replied, that the said Samuel Sprigg, together with Peter Yarnall and Co., Richard Symms, Alexander Mitchell and Z. Jacobs acknowledged themselves to be jointly and severally held and firmly bound, as principals, to the said president, directors and company of the Bank of Mount Pleasant, for the use of the Bank of Mount Pleasant, in the sum of \$2100 as aforesaid. The defendant demurred to this replication.

The circuit court gave judgment for the plaintiff on the replication to the second and sixth pleas; from which judgment, the defendant prosecuted this writ of error.

The case was argued by *Ewing*, for the plaintiff in error ; and by *Cannon*, for the defendant.

Ewing stated, that the suit arose out of the banking transactions of the defendant in error, in which, in order to get rid of the difficulties attending on loans on promissory notes, the form of a single bill had been adopted. Upon such an instrument, the bank extended the credit given the borrower, without surrendering the obligation ; and they supposed it might be done, without impairing the liability of any of the parties to the instrument ; this is denied. The real borrowers of the bank were Peter Yarnall & Co. Had the other parties to it known that the time for the payment of the debt was extended, they could have protected themselves. The defendant below had a right to show these facts, and this was the object of the pleas.

He contended, that the plaintiff in error should not be estopped to plead his second and sixth pleas, because they are not necessarily in contradiction of his bond. He may have signed the bond "as principal ;" and yet all the facts set forth in the plea, which show him to be a surety for the payment of the money, may be true. *If the plea be not necessarily [*262 inconsistent with the bond, the party is not estopped to plead it. The legal effect of the instrument is in no wise changed, by the insertion of the words "as principal," in the bond. All joint and several obligors are principals, unless the contrary appear. 4 Ves. 824 ; 3 Atk. 91. One of several joint and several obligors may plead that he is but surety. *Bank*

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of Steubenville v. Carroll's Administrators, 5 Ohio 207 ; *Pain v. Packard*, 13 Johns. 174 ; *King v. Baldwin*, 2 Johns. Ch. 554 ; s. c. 17 Johns. 394.

He also contended, that the third and fifth pleas are good. They set forth, in substance, that this was a banking transaction ; that Sprigg was but surety for the loan ; and that the plaintiff, by agreement, founded on a money consideration, did, on the day the bond became due, give Yarnall & Co., the principal debtors, further time to make payment ; and this without the knowledge or consent of the surety. These pleas are certain to a common intent. By a fair construction of their several clauses, they sufficiently set forth all these facts. H. Bl. 530 ; 1 Doug. 158 ; 1 Saund. 274, n. 1. The averment of the new contract, to give time, is good, without showing whether it was agreed in writing or by parol. It will be intended, that the agreement was valid. 2 Saund. 305, n. 13.

A bond under seal may be waived or postponed, before breach, by entering into a new contract by parol. *United States v. Howell*, 4 W. C. C. 622 ; 2 Ves. jr. 542 ; 2 Rand. 333 ; *United States Bank v. Hatch*, 6 Pet. 258 ; 16 Johns. 71 ; 8 East 576.

Cannon, for the defendant.—The obligation on which the suit was instituted, was taken in the form in which it was executed, to avoid the difficulties which the plaintiff in error endeavors to raise by the pleadings. The bank, not desiring to limit the loan to the period stated in the obligation, and yet desirous to avoid the difficulty which an extension of the loan, without a new obligation, would create, have taken from the parties an acknowledgment, under seal, that each is bound severally as well as jointly. The question to be decided by this court is, whether this is an estoppel to the allegations in the pleas. If the court *shall decide that such is *263] the effect of the instrument, they will affirm the judgment of the circuit court.

He denied, that any case can be found in which, where a party to a sealed instrument has declared himself a principal, he can claim that he was only a surety. None of the cases referred to by the counsel for the plaintiff in error sustain the position. After a particular examination of the cases cited by Mr. Ewing, Mr. Cannon cited *Hunt v. United States*, 1 Gallis. 32. To establish the doctrine of estoppel, as applicable to the case, he cited *Chitty on Plead.* 636 ; 27 Vt. 9 ; *Chitty's Eq. Dig.* 393 ; 1 Saund. 316 ; 7 Cranch 228.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up from the circuit court of the district of Ohio, upon a writ of error. It is an action of debt, upon a single bill or obligation, executed by the plaintiff in error and several others, bearing date the 20th of February 1826, for the payment of \$2100, sixty days after date. The declaration is in the usual form. The defendant pleaded the general issue, and five special pleas. To the second and sixth pleas the plaintiff replies, and the defendant demurs to the replications ; and to the third, fourth and fifth pleas, the plaintiff demurs. Judgment was rendered for the plaintiff in the court below, on both demurrers. The material question in the case arises upon the second and sixth pleas, and the replications to them ; *oyer* of the obligation having been craved, and spread upon the record. The second plea sets up in bar of the action, that the \$2100 mentioned in the writing obligatory, was a loan

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made by the plaintiff to Peter Yarnall & Co. (the first named obligors), and for their accommodation ; and that the writing obligatory was given to the bank, for the sole and only purpose of securing the payment of the said loan, at the expiration of sixty days from the date thereof ; and that the defendant and Richard Symms, Alexander Mitchell and Z. Jacobs were sureties only, and were so received and treated by the plaintiffs ; that Peter Yarnall & Co. received, for their own exclusive benefit, the entire amount of the said \$2100, and were so entered and charged on the books of the bank ; and it is then averred, that when the writing obligatory became due, the plaintiffs, on payment of \$22, as the discount for sixty days then next following, agreed with the said Yarnall & Co., without the knowledge and consent of the defendant and his co-sureties, to give a *further credit of sixty days on the said loan, and did give such further credit ; by reason whereof the defendant alleges that he is discharged from all liability on said writing obligatory. The sixth plea is substantially the same, with an additional averment of a further extension of credit on the loan, and the insolvency of Yarnall & Co. To the allegation in the pleas, that the defendant and the others named were sureties of Yarnall & Co., the plaintiffs reply, that the defendant ought not to be permitted to plead the same, because they say, that, by the said writing obligatory, the defendant and the other obligors, by the said writing obligatory, acknowledged themselves to be jointly and severally held and firmly bound, as principals, for the payment of the said \$2100 to the Bank of Mount Pleasant. To this replication, the defendant demurs ; and the real question raised by these pleadings is, whether the defendant can set up in his defence, that he was only surety in the obligation for Yarnall & Co., in direct opposition to his acknowledgment that he executed it as a principal.

It is unnecessary to enter into the inquiry, whether it would not have been more correct pleading for the plaintiff to have demurred to the defendant's pleas, instead of replying. The defendant craved *oyer* of the obligation, and it is spread upon the record ; and is to be taken as a part of the declaration. And if the replication should be considered bad, the plea is open to examination. It is an established rule in demurrers, that although the pleading demurred to may be defective, the court will give judgment against the party whose pleading was first defective in substance. The question is, therefore, to be considered upon the validity of the plea.

If the defendant can be let in to set up that he was surety only, the matter alleged is sufficient to exonerate him from liability in the present suit. It falls within the settled rule of law in relation to sureties, that extending to the principal further time of payment, by a new agreement, will discharge the surety. This, indeed, has not been denied on the argument. It has been contended, that it appearing expressly, on the face of the bond, that the defendant acknowledged himself as principal, did not vary the question ; for that all joint and several obligors in a bond are, in judgment of law, considered principals. This is true, as a *prima facie* presumption of law ; but is not conclusive upon a party, when drawn in question before a proper tribunal. But as matter of estoppel at law, it may stand on a different footing ; and is, at all events, as matter of fact, more conclusive.

The doctrine of the law upon this point is plain and *explicit. And it does not require the multiplication of authorities to show, [*265

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that the rule is well established. In *Huntington v. Havens*, 5 Johns. Ch. 26, it is laid down, that a general recital in a deed will not conclude a party ; though the recital of a particular fact may estop him. Co. Litt. 352 a; 27 Vt. 9. And in *Stow v. Wyse*, 7 Conn. 220, it is said by the supreme court in Connecticut, that when a party has solemnly admitted a fact, by deed under his hand and seal, he is estopped not only from disputing the deed itself, but every fact it recites. And in the case of *Carver v. Astor*, 4 Pet. 83, this court, in speaking of the effect of recitals and their operation by way of estoppel, say, that the recital of the lease in the deed, was not only evidence between these parties, of the original existence of the lease, but was conclusive evidence of that original existence. An estoppel has sometimes been quaintly defined, the stopping a man's mouth from speaking the truth ; and would seem, in some measure, to partake of severity, if not of injustice. But it is, in reality, founded upon the soundest principles, as a rule of evidence ; that a party has, by his own voluntary act, placed himself in a situation, as to some matter of fact, that he is precluded from denying it ; and in its application to the dealings and contracts of men in the affairs of human life, it is a salutary practical rule, that a man shall not be permitted to deny what he has once solemnly acknowledged. In ordinary cases, where sureties sign an instrument, without any designation of the character in which they become bound, it may be reasonable to conclude, that they understood that their liability was conditional, and attached only in default of payment by the principal. And hence the reasonableness of the rule of law, which requires of the creditor, that his conduct with respect to his debtor, should be such as not to enlarge the liability of the surety, and make him responsible beyond what he understood he had bound himself. But when one who is in reality only surety, is willing to place himself in the situation of a principal, by expressly declaring upon his contract that he binds himself as such ; there cannot be any hardship in holding him to the character in which he assumes to place himself. As to that particular contract, he undertakes as a partner with the debtor ; and has no more right to disclaim the character of the principal, than the creditor would have to treat him as principal, if he had set out in the obligation that he was only surety. These observations are only made, for the purpose of showing there is no hardship in the case ; for it is most generally from the hardship of particular cases, that attempts are *made to innovate upon general principles. And courts, sometimes, [266] too readily yield to considerations of this kind, to attain what may be considered the abstract justice of the particular case before them.

But admitting, that although the defendant has upon the face of the obligation become bound as principal, yet a court of equity might allow him to set up that he was only surety, and let him in to all the protections that are usually extended to sureties ; the present case is to be governed by rules applicable to proceedings in courts of law : and upon this point, the rule seems to be well settled, that where principal and surety are bound, jointly and severally, in a bond, although there is no express admission on the face of the instrument that all are principals, yet the surety cannot aver by pleading that he is surety only. In the case of *Rees v. Berrington*, 2 Ves. jr. 542, Lord LOUGHBOROUGH held, that when two are bound, jointly and severally, in a bond, they both appear as principals, and the surety can-

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not aver that he is bound as surety ; but if he could establish that at law, the principle at law is, that he has an interest in the condition ; and if the time of payment is extended, that totally defeats the condition, and the consequence is, that the surety is released from his engagement. This point is directly adjudged in the case of the *People v. Jansen*, 7 Johns. 337. The question there turned entirely upon the pleadings ; and the court let in the defence which discharged the surety, upon the sole ground, that it appeared upon the face of the bond, that the ancestor of the defendant was surety only ; otherwise, the defendant would have been estopped by the bond, from alleging that he was surety only. But the fact appearing upon the face of the bond, the defence might be set up at law, as well as in equity. The case of *Pain v. Packard and Munson*, 13 Johns. 174, although the court admitted the surety to set up by plea at law, matter in discharge of his liability, is very distinguishable from the present case. That was a suit upon a promissory note, and the court, upon demurrer, sustained a plea interposed by the surety, alleging a special request made to the plaintiff to prosecute the principal, and averring a loss of the debt, by reason of his neglect to prosecute. The plea in that case was sustained, on the ground that there was no conflict between the note and the averments in the plea. For, say the court, the averments and facts stated in the plea are not repugnant or contradictory to the note. That the fact of Packard having been surety only, is fairly to be presumed to have been known to the plaintiff ; and he was in law and equity bound to *use due diligence [^{*267} against the principal, in order to exonerate the surety. The plea averred, that Packard signed the note as surety, and the demurrer admitted the facts. Had it appeared upon the face of the note, that Packard signed it as principal ; there is no reason to conclude, that the court would have let in the defence then set up. It could not, in such case, have been said, that there was no repugnancy between the averments in the plea and the note ; which was the ground upon which the plea was sustained. But this case has not, under any view of it, relaxed the rule with respect to bonds or sealed obligations ; which are not open to an inquiry into the consideration. The case of *Pain v. Packard* was a suit between the original parties to the note—the payee against the makers. Packard, although surety, signed the note as one of the makers ; and between the original parties to a note, the consideration may be inquired into. In the case of *King v. Baldwin*, 2 Johns. Ch. 556, the chancellor says, I do not understand the supreme court as holding, in the case of *Pain v. Packard*, that the averment would be admitted, in direct opposition to the terms of the note ; that such evidence would be entirely inadmissible. And as to this proposition, we do not understand there was any difference of opinion between the supreme court and the chancellor. The point of difference between the two courts, related to the effect with a non-compliance by the creditor, with the request of the surety to prosecute the principal, would have upon the liability of the surety ; the chancellor holding, that in order to discharge the surety, there must be some new agreement between the debtor and creditor, varying the contract by which the surety originally became bound. The court of errors, on an appeal (17 Johns. 384) from the decree of the chancellor, in the case of *King v. Baldwin*, may be considered in some measure as affirming, by a divided court (which very much weakens the authority of

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the case), the decision of the supreme court in *Pain v. Packard*. We are under no necessity, however, of expressing any opinion upon the point of difference between those courts. That point has no bearing upon the question now before this court.

The case of the *Bank of Steubenville v. Administrators of Carroll*, 5 Ohio 207, in the supreme court of Ohio, has been relied upon to support the pleadings and defence set up in this case. But that case differs from the present, essentially, in the main point. No *oyer* of the bond is there spread upon the record; so that it does not appear upon the face of the bond, that [268] the defendant signed as principal. The plea alleged, *that the defendant signed as surety, and this the demurrer admits; and the fact of surety being assumed as admitted, the court only decided, that if any change be made between the creditor and the principal, to the prejudice of the surety, that it discharges the surety, and that this defence may be set up at law as well as in equity. That such was the ground on which this case stood, is evident, from the manner in which the question is put by the counsel to the court. The plea, say they, alleges, that the defendant signed and sealed the obligation as surety, and not as principal; and this is admitted by the demurrer; and therefore, the inquiry is presented, free from all embarrassment, viz., is the surety discharged by the creditor's giving the principal further credit or time of payment. And this would seem to be the light in which the case was viewed by the court. And this conclusion is strengthened by the circumstance, that the authorities referred to in support of the decision, go to show, that a court of law, as well as a court of equity, can afford relief to the surety, when the facts upon which such relief rests are properly before the court. And in this view of the case, it is not at variance with the admitted rule in courts of law. But this does not meet the difficulty in the present case. The fact of the defendant's being surety is not only not admitted; but it is alleged, that he is estopped from setting it up, by his own admission, in his obligation that he is principal. And we are not aware of any case giving countenance to such a defence at law, under such circumstances.

The fourth plea is admitted to be bad; and the objections to the third and fifth are substantially the same as to the second and sixth. They attempt to set up that the defendant was only surety in the obligation. But this defence is equally precluded here by the estoppel, as in the other pleas. The judgment of the circuit court is accordingly affirmed, with costs.

Judgment affirmed.¹

¹ After this affirmance, Sprigg brought a suit in equity to enjoin the judgment, upon the same ground, that he was only a surety, and had been discharged by the act of the bank, in giving time to the principal debtor, but failed on the hearing. 1 McLean 384. And the

decree of the circuit court, dismissing his bill, was affirmed in 14 Pet. 201. See Hubbard v. Gurney, 64 N. Y. 457, where this subject is discussed. Also, Knowles v. Cuddeback, 19 Hun 590.

*BURTIS RINGO, JAMES ELLIOTT, JOHN COLLINS, JOHN ELLIOTT, JAMES LAWRENCE, THOMAS WATSON, ATHEY ROWE, GEORGE MUSE, sen., and GEORGE MUSE, jun., Appellants, v. CHARLES BINNS and ELIJAH HIXON, STEPHEN HIXON, NOAH HIXON, JOHN HIXON, WILLIAM HIXON and TIMOTHY HIXON, heirs of TIMOTHY HIXON, deceased.

Land-law of Kentucky.—Constructive trust.—Equity.—Remedy at law.

An agent, who had been employed to perfect the title to a tract of land for his principal, in the course of his agency, became acquainted with its deficiency; and having concealed this from the principal, obtained a legal title to the same land for himself; an application was made to the legislature of Kentucky, by the holders of the imperfect title, to supply its defects; which was done by a law specially enacted for that purpose; of this proceeding, the agent was informed; and when it was stated to him, that his conduct, to the injury of his principal, might be attended with unpleasant consequences to himself, he declared in writing, under his hand, in the presence of two witnesses, that he disavowed an intention to interfere with the title of his principal, and assigned the title he had acquired to him, that the same might be carried into grant; at the same time, he was paid \$100 for his expenses, &c. In violation of this transfer, he took out patent for the same land in his own name; and a bill was filed in the circuit court of Kentucky, to compel him to convey the legal title, thus acquired, to those who held the equitable title, under the act of the legislature of that state.

The complainants' entry and survey were raised by the legislature into a right, to the exclusion of every right; and any patent afterwards issued was a nullity; the legal title of the complainants did not rest upon the statute for granting lands, but upon an act of the legislature directing an unregistered survey, inoperative by the lapse of time, to be registered; and a patent to be issued upon it. When this fact was passed in favor of the complainants, the land covered by the survey became excepted from the mass of ungranted vacant land; and the complainants acquired rights in it, which could not be defeated by a patent to any other person.

If an agent discover a defect in the title of his principal to land, he cannot misuse it, to acquire a title for himself; and if he does, he will be held as a trustee holding for his principal.

The tenants in possession of land, of which the complainants claimed a conveyance of the legal title, were made parties to the proceeding, by an amended bill; the original bill having charged that the land had been occupied by them for ten or twelve years, as the tenants of the holders of the legal title; they were not charged with fraud, nor were they placed in any such relation to the land. No case exists, as to the tenants, for the interference of a court of equity, whether they occupied the lands as the tenants of the holder of the legal title, as declared in the original bill, or as tenants in possession under another: the complainants are to be supposed to have their remedy at law for the recovery of the land, until they shall charge and show, that the tenants obtained, and retain possession, in contravention of some equity subsisting between them and the complainants.

*APPEAL from the Circuit Court of Kentucky. The facts, as stated in the opinion of the court, were the following: [*270

The object of this appeal is, to reverse the decree of the circuit court, by which the appellants were ordered to convey to the appellees, by deeds of release, with covenants of warranty against themselves and their heirs, and those claiming under them, all the right, title, interest and claim which they respectively have to lands embraced by a patent of 2000 acres to Charles Binns, jun., and the heirs of Timothy Hixon, and their heirs, dated the 16th of October 1824.

It appears by the proofs in the cause, that a survey of 2000 acres was made on Indian creek, alias Fox's run, or Mason run, Henry county, Kentucky, on the 20th of November 1797, for John Alexander Binns and Charles Binns, by virtue of an entry made the 5th of August 1783. The original survey, by accident, or from the negligence of an agent of the Binns's, to whom it had been sent for such purpose, had never been registered, and

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was lost ; but a copy of it was preserved, which determined with exactness the locality of the land. It was known as Binns's land, in the neighborhood, and by those owning the contiguous lands. John Alexander Binns transferred his interest in the survey to Husly Bagges, by whom it was sold to Timothy Hixon, the ancestor of Hixon, the appellee. Charles Binns, in August 1819, appointed John Littlejohn his agent and attorney, with a power of substitution, to attend to this land and his other land in Kentucky, and Littlejohn associated with himself in such agency Burtis Ringo. Ringo, during the agency, and particularly whilst acting in concert with Littlejohn and William P. Rogers, to procure a division of the land between the appellees, called upon Rogers, to ascertain when a division of the land could be decreed. Rogers told him, there was a difficulty in the way, as the survey had not been returned to the register's office, and that no patent had ever been issued for the land. He received the information in May or June 1822. On the 10th of July following, he wrote to Littlejohn, and after acknowledging that he had been requested to assist in dividing "Binns's land," he states that he had been at Frankfort ; had made search for Binns's patent ; but found the return of the survey had not been made, and that no grant had been issued. He further says, he supposed it would be unnecessary to be at any further trouble about it, until Mr. Binns had been heard from ; as he had written to him, if he had a patent, to send it on as soon [271] as *possible to Littlejohn or himself ; and he requested Littlejohn to send it to him, if Littlejohn should receive it. On the same day, he wrote a letter to Binns, in which he says, having been requested by Littlejohn to assist him in dividing your lands between you and Mr. Hixon's heirs, he had been in the register's office, and finding that the release of the survey had not been made, and that a grant had not been issued, he advises Binns to be at no further expense about it, as it appears no grant can have issued ; and that Binns would be wrong, if he thought there was no better right on the land. On the 8th of July, two days before he had written to Littlejohn and Binns, Ringo had taken from the register's office warrants for 500 acres and 100 acres of land, and caused entries and surveys to be made upon 600 acres of the original 2000 acre survey, which had been made for John Alexander Binns and Charles Binns. The surveys were made on the 20th of July, and returned to the register's office, in his own name, on the 24th of August. When charged by Littlejohn with the fraudulent attempt upon the rights of those principals, and told that application had been made to the legislature of Kentucky, to authorize a patent to be issued upon the original survey, on behalf of the Binns's, and that his conduct was known to a committee of the legislature, and might be attended with unpleasant consequences to himself ; Ringo, to avoid them, and to prevent a most notorious disclosure of his fraud, expressed in writing his willingness that such an act should be passed by the legislature, as the complainant had applied for, and gave to Littlejohn, under his hand and seal, a paper, of which the following is a copy :

"Whereas, it has been represented, that I, Burtis Ringo, of Fleming county, state of Kentucky, had made two entries and surveys of 600 acres of land, said to belong to John Alexander Binns and Charles, of Virginia, and that the said John A. Binns had sold to Timothy Hixon, now deceased, and that I had extended the surveys for my own benefit, though an agent

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under John Littlejohn, for said Binns ; I hereby disavow such intention, and do by these presents assign over all my right, title and interest in the said extends and surveys to Charles Binns and the said heirs of Timothy Hixon, to be carried into a grant at their proper expense ; hereby renouncing all claim by virtue of said entries and surveys, and assigning them to the said Binns and Hixon's heirs. As witness my hand and seal, this 4th day of November 1822.

BURTIS RINGO." [L. s.]

"Signed and acknowledged in the presence of us—Daniel Fechenlen, John Littlejohn." [*272]

Before the instrument was executed by Ringo, Littlejohn agreed to give him \$100, to reimburse the amount he had expended in procuring the warrants and making the surveys of the 600 acres ; paid him \$50 in Commonwealth paper, and give him a note of hand for \$50.

The legislature of Kentucky acted upon the petition of the complainants ; passed an act on the 10th of December 1822, recognising the survey of the 20th of November 1797, made on the entries of the 5th of August 1783 ; and the same was carried into a grant in favor of Charles Binns, jun., and the heirs of Timothy Hixon and their heirs, on the 16th of October 1824. In the mean time, Ringo, in violation of his transfer of the entries and surveys for 600 acres to Binns and the heirs of Hixon, took out a patent in his own name. The aforesaid facts were charged in the bill of the complainants ; were denied by Ringo in his answers ; but were established by proof at the hearing. In the original bill, Ringo was the only defendant ; but the complainants charge in it, that the land had been occupied, for ten or twelve years, by tenants of Binns. By an amended bill, the tenants, James Elliott, John Collins, John Elliott, James Lawrence, Thomas Watson, Athey Rowe, George Muse, sen., and George Muse, jun., were made parties, and stated to be tenants in possession of the land claimed by the defendant ; and the complainants make the same prayer against the tenants, as they had against Ringo in the original bill.

The circuit court made the following decree : The court being now sufficiently advised of and concerning the premises, doth order and decree, that the defendants, Burtis Ringo, James Elliott, John Collins, John Elliott, James Lawrence, Thomas Watson, Athey Rowe, George Muse, sen., and George Muse, jun., do, on or before the sixth day of the next term, convey to the complainants, by deeds of release, with covenants of warranty against themselves and their heirs, and those claiming under them, all the right, title, interest and claim which they respectively have to the lands embraced by the 2000 acre patent to Charles Binns, jun., dated 16th of October 1824 ; and the writ of *habere facias possessionem* is awarded the complainants against the said defendants. And it is further ordered and decreed, that the defendants pay to the complainants their costs herein expended. The defendants appealed to this court.

*The case was argued by French and Underwood, for the appellants ; and by Semmes and Coxe, for the appellees. [*273]

The counsel for the appellants presented the following points for the consideration of the court. The counsel for the appellants contend the decree is erroneous, and must be reversed for the following reasons, to wit :

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1. The decree has passed against John Collins, who is no party to the record.

2. The court has no power to decree tenants in possession merely, to convey. They must either hold the legal title, or an equity to the land, growing out of the asserted title of the appellees. The appellees have shown neither.

3. The circumstances under which Ringo executed his relinquishment, were such that the contract cannot be specifically executed upon him by the chancellor. 1st. Because there was no consideration paid, or agreed to be paid Ringo for his claim. The \$100 was to indemnify him for expenses, in procuring his own claim; and not as a consideration for the purchasing it; and for the want of a valuable consideration, the chancellor will not decree a specific execution of a contract. 2d. If the \$100 shall be considered as payment for his claim, it is wholly inadequate; and the inadequacy of price is an insuperable barrier to a specific execution. 3d. The deed was unfairly and fraudulently obtained by Littlejohn; and for that fraud, the chancellor will refuse specific execution of the contract.

4. There is no proof that Elijah Hixon and others, claiming to be the heirs of Timothy Hixon, deceased, are his children. Such proof is indispensable, and, for want of it, it does not appear they have any interest whatever in the land. They sue as heirs, and not as devisees; and the *allegata et probata* must correspond.

French and *Underwood* contended, that the equity relied on by the appellees is twofold. 1. They relied upon an entry for 2000 acres of land, carried into grant, in pursuance of a special act of the general assembly of Kentucky. 2. They relied upon a contract, by which they contend Ringo bound himself to transfer and assign to them his plats and ^{*274]} certificates of survey; and thereafter fraudulently refused to comply, and obtained patents for the land in his own name. If both these grounds of equity are untenable, the decree must be reversed and the bill dismissed.

To constitute a valid entry, it must call for objects notorious at its date; and it must be so special in its particular location, that others might appropriate the adjacent vacant and unappropriated lands with safety. This proposition is established by an unbroken chain of adjudications in Virginia and Kentucky; extending from the passage of the Virginia act of 1779, usually called the land-law, down to the present time. Now, there is no proof in this cause, showing the notoriety and specialty of the entry of the appellees. They cannot, therefore, succeed on that ground of equity.

The appellees cannot derive any equity from the patent, upon the entry for 2000 acres; because, before the emanation of the patent, the land had been appropriated by Ringo. He had vested rights, which could not be divested by a special act of the legislature of Kentucky. The entry had become void, by the failure to have it surveyed and carried into grant, as prescribed by law; and the land covered by it (if indeed, it covered the land now in controversy, which is not proven nor conceded) was subject to appropriation by Kentucky land-office treasury warrants. Ringo did appropriate it by such warrants. Thereafter, the legislature of Kentucky could not constitutionally revive the equity, if any ever existed, under the entry for 2000 acres; so as to interfere with the rights of Ringo previously vested.

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Such a revival of a dead equity, would violate the rights which Ringo derived under his contract with the government. So far, therefore, as the decree rests for support upon the adverse title set up in the bill, it cannot be sustained.

Upon the second ground of equity relied on, the decree cannot stand. Under this head, the case presents itself as one for a specific execution of a contract. Applications of this kind are presented to the sound discretion of the chancellor. In this case, he ought to leave the parties to their legal remedies; because, by depriving Ringo of his title, he will lose property of the value of \$2000 and more, without receiving therefor one cent. It is true, that Ringo received \$50 in notes on the Bank of the Commonwealth, and the note of Littlejohn for \$50 more. But these sums were agreed to be paid as a remuneration for Ringo's trouble and expense in locating, surveying and purchasing his land-warrants, under the idea that he acted [*275 in the business, as agent for the appellees; and not as an equivalent or as a consideration for the land, regarding it as a sale and purchase. The whole transaction, as manifested by the record, exhibits nothing like the ordinary bargain and sale of land. But if that were the case, the court should not interfere and compel a specific execution, because of the inadequacy of the price. Ringo was induced to execute the instrument, promising to assign his plats and certificates of survey, on account of the alarm excited in his mind, by the representations of Littlejohn, that the legislature of Kentucky would institute proceedings to remove Ringo from office. An obligation thus obtained, should never be specifically enforced by the chancellor.

It was not fraudulent in Ringo, to appropriate the land, upon ascertaining that the appellees had no title. If he obtained that knowledge, while he was acting as agent for the appellees, there is no principle of equity which can preclude him from making a profit by the knowledge he had acquired; or which can convert Ringo into a trustee, holding the legal title for the use of the appellees. It might have been a friendly or benevolent act on the part of Ringo, on ascertaining that the appellees had no title, and that the land was vacant, to communicate the fact to the appellees, and advise them to purchase land-warrants and locate them on the land. But his failure to do so, and his proceeding to appropriate the land for himself, cannot amount to a fraud on the appellees. If it does, he is guilty of it, merely because he did not voluntarily communicate his knowledge of facts, and give the advantage of the speculation to the appellees; when he was not employed by them as agent for any such purpose, and when he was under no legal obligation to give them the benefit of his discoveries. As well might it be contended, that the common carrier, who is taking wheat to market, is legally bound to make known to the owner all the facts which he may have learned, and which have produced a sudden advance of fifty per cent. on the price of the article; as to contend, that Ringo, merely because he had a special agency in dividing the land, was bound, in consequence, to inform the appellees what discoveries he had made as to the title. If the carrier purchases the wheat, permitting the owner to remain ignorant of the facts which have operated to enhance the price, no court can or would deprive him of the profits of the speculation. Ringo's case deserves more favor, because the appellees had no interest whatever in the land which Ringo appropriated to

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himself. They supposed, they had an interest and title to it ; but *this was a mistake ; the land was vacant, and, like all vacant land, liable to be appropriated by those who might discover its situation ; and in this respect, the appellees did not occupy a more favorable position than Ringo.

There are two grounds upon which the decree must be reversed, unconnected with the foregoing considerations. 1. There is no proof that the appellees are the children of Timothy Hixon, deceased. They sue as his heirs. They must prove the facts upon which the court, as matter of law, can pronounce them heirs. There is no such proof. A witness cannot prove, *in totidem verbis*, that A. is the heir of B.: he must prove the degree of consanguinity ; he must state the facts, and leave the deduction to the court. The will which shows that the appellees are devisees of Timothy Hixon, cannot sustain the bill which alleges they were heirs. The *allegata* and *probata* must correspond. 2. The record shows that the defendants, except Ringo, were the tenants of the appellees, entering upon the land under them, in virtue of leases. The appellees cannot maintain a bill against their own tenants, to compel them to surrender their title and possession. The tenants are estopped to deny the title under which they entered, and if they held over, the remedy of the appellees was complete at law.

Sennex, for the appellees.—The allegations of the bill are, without exception, sustained by the evidence filed in the cause. The answer of Ringo is *rudis et indigesta moles* of false assertions, personal vituperation and untenable positions. Exceptions should have been filed in the court below ; the answer referred to a master, and the offensive matter stricken out. The evidence falsifies every allegation in the answer. It is even impaired in credit, by the depositions taken to support it ; they are merely negative, the witnesses “knowing nothing” of the material facts.

The counsel for the appellants contended, that as Ringo had procured the elder grant, under which the legal title passed, his claim was superior in law and equity to that of the appellees. The reply to this argument is to be found in all the decisions of the states of Virginia and Kentucky on the subject, and of this court in 5 Cranch. The case of *McClung v. Hughes*, 5 Rand. 453, was a case in point. It was there held, and declared to be the settled law, drawn from all the decisions, that a party having claim to lands, entered and surveyed by another, should have recourse to the statutory remedy of **caveat*, to prevent the emanation of a [277] patent ; that he is not to be sustained in a court of equity, on such grounds as might have been used on the trial of the *caveat* ; but that upon a case suggesting or proving that he was prevented by fraud or accident from prosecuting his *caveat*, equity will take jurisdiction of the case and grant relief. The effect of an entry is to give a party an equitable interest in the land located, to be clothed with the legal title only on the issuing of a grant or patent. Two parties entering the same land have each an equity ; and if a subsequent locator should obtain a patent first, another maxim of equity will apply, that where the equity is equal, the law shall prevail, and his title to the lands is perfected ; all equities being equal, without regard to priority of time. The inequality proceeds from fraud or culpable *laches* ; and to deprive a subsequent locator, with the legal title, of the benefit of

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this rule, it must appear, that he was guilty of some act or *laches*, making it unconscientious in him to insist on his title.

Now, what is such fraud? A. has a prior entry and a subsequent patent. B. has a subsequent entry, but a prior patent. A.'s entry is a record; of this B. must take notice; if not, his ignorance will not excuse him; if, with this knowledge, he locates the land entered by A., it is a fraud; and though he obtains a legal title by patent, his fraud will postpone him, and the prior equity will prevail. 5 Rand. 475-6, 488-9, 504. These principles were recognised by this court, in *Bodley v. Taylor*, 5 Cranch 191; and in *Taylor v. Brown*, Ibid. 234, it was decided, that a subsequent entry, even without fraud, must be postponed to a prior—and although the subsequent locator produced a prior patent. Does the present case come within the rule here laid down? It does, with the additional circumstance, that the subsequent locator here stood in a fiduciary relation to the prior, and made use of his situation to procure a knowledge of his principal's defect of legal title. If Ringo had a better title, his not proceeding to *caveat* the grant of the appellees, is evidence of his fraud, under the circumstances of the case.

The appellants contend that the decree must be reversed:

1. Because it had passed against John Collins, who is no party to the record. This is not true, for the *subpoena* was served on him, as appears by the marshal's return; and if true, would not vitiate the decree as to the other appellants.

2. That the tenants on the land (who were made defendants by *an amended bill) are mere tenants in possession; and the decree is [*278] for them to convey the legal title, i. e., that a decree for the legal title will not pass the possessory right! That a court of chancery has no jurisdiction over tenants in possession, but that the remedy is at law. The answer to this position is, that the bill does not name them, and aver that they are tenants in possession. They are made defendants, to do complete justice between all the parties in interest. But their own answer to the amended bill concludes them on this head. They allege, that they do not claim either under the appellees, or the appellant Ringo; but that the legal title is in them, and attempt to prove it. They fail; the cause, *quoad* their legal title, was before the court; and a better title being proved in the appellees, warranted the court in a decree to convey.

3. That the relinquishment of Ringo was fraudulently procured. There is no proof of this; and throwing it out of the case, on the principles before established, we hold the better title.

4. The answer denies that the complainants, Hixons, are the heirs of Timothy Hixon, and that there being only one witness in contradiction on this point, the answer is conclusive of the fact. The reply is, that to give an answer in chancery the force of evidence, *per se*, so as only to be rebutted by two witnesses, or one witness and corroborating circumstances; the answer, *pro re nata*, must be responsive to the bill, or in answer to some interrogatory in the bill. Affirmative allegations in an answer are in this respect on no better footing than those in a bill. On this point, it is not responsive. If it were, the title of the Hixons and their identity are clearly made out by the evidence. And moreover, if it were responsive, and not positively contradicted by two witnesses; the fact, if important, could not

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avail, inasmuch as the answer being deprived of credibility in other respects, is so in this ; for *falsum in uno, falsum in omnibus*.

5. It is contended on behalf of the tenants in possession, that having occupied the lands more than twenty years, the act of limitations bars our title. But—1. The act of limitations can only be taken advantage of by pleading it ; that has not been done. 2. They must be looked on in the light of trustees for us, the entry in the surveyor's book being notice of our claim (5 Rand. 475) ; the implied trust obviates the bar of the statute. 3. The fraud, the *mala fides*, inferred from this notice, will prevent the act from attaching. 4. They contend that the appellees have no title, but that the title is in them, by virtue of this possession. If the *appellees [279] have no title, the lands are vacant, and they are pleading the statute against the state. Wild lands can only be appropriated by the regular mode of warrant, entry, survey and grant. Possession gives no title as against the state.

These tenants claim by purchase from Christy. They do not show the derivations of his title ; set out no deed from Christy to them, nor state the purchase-money or consideration of the conveyance. The evidence proves, that at one time they professed to hold under the appellees ; at another, under the appellant Ringo ; and now, only claim the legal title. Their claim to compensation for improvements on another's land, cannot, on the general principles of law, be allowed. As to the form of the decree, it is precisely as in the case cited from 5 Cranch.

WAYNE, Justice, delivered the opinion of the court.—After stating the case, he proceeded: It is contended, that the decree is erroneous and should be reversed. In behalf of Ringo, it is urged, that he has a prior legal title, unaccompanied by any equity of the complainants. The legal title must rest upon entry, survey, registry and patent ; and it will be admitted, that a legal title cannot be in any one, until a patent has been issued ; and further, that all of those requirements to make a complete title, shall have been done without fraud, to give to a patentee a valid title. If, then, in the course of carrying his surveys into grant, and before a patent upon them was issued to him, Ringo, under a notice to *caveat* the application of the complainants to the general assembly of Kentucky, for leave to bring in a bill to authorize a copy of those original surveys for 2000 acres to be received and registered, that a patent might be issued to them ; acknowledged their equity to be superior to his immature legal rights, and expressed his willingness that it should be affirmed by legislative enactment ; it being done by the legislature, its acts nullified his surveys, and the latter could not be afterwards any foundation for a patent of the same land to himself. The complainants' entry and survey were raised by the legislature into a right, to the exclusion of every right of Ringo ; and any patent afterwards issued to him, upon his entries and surveys, is a nullity. The legal title of the complainants does not rest upon the statute for granting lands, but upon an act of the legislature, directing an unregistered survey, inoperative by the lapse of *time, to be registered, and a patent to be issued upon it. When this [280] act was passed in favor of the complainants, the land covered by the survey, under the entry of the 5th of August 1783, became excepted from the mass of ungranted vacant land ; and the complainants acquired rights

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in it, which could not be defeated by a patent upon Ringo's entry and survey.

This view of the case makes it unnecessary for us to consider the objections to the decree, growing out of Ringo's transfer of his entries and surveys to the complainants; namely, that there was no consideration paid, or agreed to be paid, for his claim; if there was, that it was inadequate, and that it was obtained by fraud. In truth, at the time that paper was executed, he had no legal or equitable interest in the land to convey, and he transferred no more than he was conscientiously bound to do; as he confessed and had so declared to others, when he was making his surveys, that they were not made with an intention to appropriate them to himself, but to enable him to make a division of the land between the complainants.

But how forcibly does the equity of the complainants prevail over any claim of Ringo, when the latter is viewed as their agent at the time he made his entry and surveys upon the land, which he had undertaken to assist in dividing between them. It is said, that an unregistered survey gave to them no equitable right in the land; and that Ringo being only an agent for the special purpose of dividing the land, he could rightfully enter and survey it for himself, when he ascertained the defect in the title of the complainants. The proposition of a want of equitable right in the complainants, is true, as against the state; for the time within which the survey should have been returned and registered, before a grant could issue, had expired; and the land had fallen into the general mass of ungranted land liable to entry, survey and grant upon treasury land-office warrants. But the mistake in the argument is, in applying the rights of the state in the land, to a right in Ringo, obtained when he was admitting to the complainants his agency for them, and making acknowledgments of their title to others, to enable him more successfully to secure, by his artifices, a title in the land to himself. On the same day, Ringo wrote two letters, one to Littlejohn and the other to Charles Binns. In both, he acknowledges himself to be the agent of the complainants; but, by the tenor of his letters to Binns, he conceals from and misrepresents to Littlejohn, and under the pretence of a friendly wish to save Binns from unnecessary *expense, he [*281 tells him, that as no survey had been made, and no grant had existed, that he need not go to any expense about it, as it appears no grant can now issue; that he will be wrong to think there was no better right to the land. These letters were written two days after he had commenced measures to secure the land for himself. The equity of the complainants, therefore, over any right of Ringo, does not arise from the former having had, at this time, any legal title to the land; but from Ringo's having practised an artifice upon the complainants, whilst he was their agent, to prevent them from curing the defect in their title, that he might deprive them of property, which, at the same time, he acknowledged to be theirs. He was guilty of deceitful practices and artful devices, contrary to the plain rules of common honesty and fair dealing between men; and could not acquire a title to the land, valid against the equity which he had acknowledged to be in the complainants. It is unnecessary to pursue this point further. The decree of the court directing Ringo to convey, must be affirmed: and the proposition laid down by this court is, that if an agent discovers a defect in the title of his principal to land, he cannot misuse it to acquire a title for

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himself ; and if he does, that he will be held as a trustee holding for his principal.

In regard to the tenants, the decree of the court must be reversed. They were made parties by an amended bill. In the original bill, the complainants charge that the land had been occupied, for ten or twelve years, by tenants of Binns, and in the amended bill, they are said to be tenants in possession of the land claimed by the defendant. Nor are they charged with fraud in either. It is not necessary, therefore, to consider the grounds urged in the argument of counsel for a reversal of the decree against the tenants, if a point arises upon the pleadings decisive of their case. Not having been charged with fraud in the bill, or placed by it in any such relation to the land, or to the complainants, no case exists for the interference of a court of equity. Whether they occupied the lands, as the tenants of Binns, or as declared in the original bill, or as tenants in possession under another ; the complainants are to be supposed to have their remedy at law for the recovery of the land, until they shall charge and show that the tenants obtained, and retain possession, in contravention of some equity subsisting between them and the complainants. The tenants are not so charged, nor is there anything in the record from which such a conclusion can be drawn. They are merely shown to be in possession of parts of *282] the original survey of 2000 acres, *which was re-surveyed by Ringo ; and it is probable, they hold under him ; but there is no proof that they were parties to the fraud which he practised upon the complainants. This point does not appear to have been made on the hearing in the court below, nor was it urged in argument in this court ; but it is obvious in the pleadings, and must be noticed by us : it is sufficient for the reversal of so much of the decree as relates to the tenants ; and it will be directed, with permission to the complainants to amend their bill, if they shall please to do so.

It was also urged, that the decree should be reversed, on the grounds that there was no proof showing that the complainants, the Hixons, to be the heirs of Timothy Hixon, and that the will of Timothy Hixon showed that the complainants should have claimed as devisees, and not as heirs. The decree being reversed as to the tenants, neither point is material to them ; and these objections cannot prevail against the affirmation of the decree as to Ringo, because the allegation in the bill of the complainants, that the Hixons were the heirs of Timothy Hixon, is not denied in the defendant's answers, and was, therefore, not a point put in issue by the pleadings. Besides, the fact not having been denied by the answer, there are ample and frequent proofs in the record, of Ringo's admission that they were the heirs of Timothy Hixon, and of his acknowledgments of their equitable right in the land in that character.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel : On consideration whereof, it is ordered, adjudged and decreed by this court, that so much of the decree of the said circuit court in this cause as directs the defendant Ringo to convey to the complainants, be and the same is hereby affirmed, with costs ; and that so much of the said decree as directs the tenants to convey to the complainants, be and the same

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is hereby reversed : and it is further ordered and decreed by this court, that this cause be and the same is hereby remanded to the said circuit court, with directions for further proceedings to be had therein, in conformity to the opinion and decree of this court, and as to law and justice may appertain.

*M. B. HAYDEL, Plaintiff in error, v. FRANÇOIS GIROD.

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Insolvent law.

By the civil code of Louisiana, a time or delay for the payment of debts, called a respite, is granted by the proper court, on petition of a debtor who is unable to pay his debts, &c. ; but notice of the proceeding must be given to every creditor, on whom notice could be served, or he is not bound by the same.

The district court of the United States of Louisiana properly overruled a defence set up to an action on a promissory note, against a debtor who had not given notice to his creditors of the proceedings for a respite ; the creditor was in no sense a party to the proceeding ; and his rights were in no sense affected by them.

ERROR to the District Court for the Eastern District of Louisiana. The defendant in error instituted a suit in the district court, on a promissory note ; and the defendant having applied, after the suit was brought, to a court of Louisiana, for the benefit of the insolvent law of that state, pleaded a respite, obtained in those proceedings, against his creditors. In the proceedings of the court of Louisiana, on the petition of the plaintiff in error, it nowhere appeared, that any notice of the same was given to François Girod ; on this ground, the district court decided against the plea, and gave judgment for the plaintiff in that court. The defendant prosecuted this writ of error.

The case was argued by Key, for the defendant in error. No counsel appeared for the plaintiff.

Key contended :—That the plaintiff below was no party to these proceedings, nor in any way affected by them ; and that the proceedings were wholly irregular, and did not entitle the defendant in the district court, to a respite against any of his creditors. Mr. Key referred to the civil code of Louisiana, art. 3051, and others ; which require that notice shall be given to the creditors of a petitioner ; and which declare, that no creditor, other than those to whom such notice had been given, should be affected by the same. *He also cited *Breedlove and Robeson v. Nicolet and Sigg*, [*284 7 Pet. 434, in which was decided the question presented in this case. He claimed ten per cent. damages, as he contended the writ of error had been sued out for delay only ; the law of the case having been clearly settled in the case cited.

MCLEAN, Justice, delivered the opinion of the court.—The case is brought before this court by a writ of error, to reverse the judgment of the district court for the eastern district of Louisiana. The plaintiff, in the district court, filed his petition, representing that Haydel, the defendant, was indebted to him in the sum of \$2189, being the amount of a certain promissory note made the 17th of July 1833, by J. J. Haydel, payable in all the month of February 1834, to the order of M. Belfort Haydel, by whom it was indorsed to the plaintiff. That when the note became due, demand was

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made and notice given, &c. On the 19th of May 1834, the defendant, Haydel, filed an answer; in which he states, for exception to the petition, that by a decree of the first district court of the first judicial district of Louisiana, all proceedings against his property and person have been stayed, upon the application of the respondent for a respite, under the provisions of the law of the state of Louisiana. "That the note or instrument upon which he is sued, being made in said state and payable there, the said Girod having, before and since the making of said note, resided within the said state, is bound by the laws thereof, and cannot, because of the decree aforesaid, further prosecute his said suit in this court, until the creditors of your respondent shall have refused the respite demanded by him, or until the period thereof, should the said creditors accord a respite, have expired." Afterwards, the defendant applied for leave to file a supplemental answer, which was refused, under the rule of the court. And on the 14th January 1835, a judgment was entered for the plaintiff.

By the civil code of Louisiana, it is declared, art. 3051, "a respite is an act by which a debtor, who is unable to satisfy his debts at the moment, transacts with his creditors, and obtains from them time or delay for the payment of the sums which he owes them." *And in art. 3054; "but [285] in order that a respite may produce that effect, it is necessary. 1. That the debtor should deposit in the office of the clerk of the court of his domicil, to whom he presents his petition for calling his creditors, a true and exact schedule, sworn to by him, of all his movable and immovable property, as well as of his debts. 2. That a meeting of the creditors of such debtor, domiciliated in the state, shall be called on a certain day, at the office of a notary-public, by order of the judge; at which meeting the creditors shall be summoned to attend, by process issued from the court, if the creditors live within the parish where the meeting shall take place, or by letters addressed to them by the notary, if they are not residing in the parish, &c." It was under this law that the matters in the defendant's answer were pleaded; and it was insisted, that the district court should have suspended all proceedings in the suit.

The defendant, it appears, exhibited his schedule, as stated in the state court; but it nowhere appears in the record, that notice was given to the plaintiff, either by the notary or otherwise, as the law requires. Without deciding what effect these proceedings in the state court, if regular, could have on the suit in the district court, it is enough to say, that as the plaintiff had no notice, he was in no sense made a party to the proceedings; and, consequently, his rights are in no respect affected by them. The district court, therefore, did not err in overruling this defence, and giving a judgment for the plaintiff. This point was decided in the case of *Breedlove and Robeson v. Nicolet and Sigg*, 7 Pet. 434. The judgment of the district court is affirmed.

THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is adjudged and ordered by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

*ELIZABETH DAVIS, Administratrix of JOHN H. DAVIS, v. ALEXANDER
BRADEN.

Certificate of division.

The defendant in an action of detinue died previous to the return-day of the term, and at the term, his death was suggested and a *scire facias* was issued to his executors, to a subsequent term, and the plaintiff moved the court to revive the suit against them; which motion, on argument, was overruled, and the suit abated; on a day afterwards, in the same term, the plaintiff's attorney moved the court to rescind the order refusing to revive the suit; and upon this motion, the judges were opposed in opinion, whether the action could be revived against the personal representatives of the defendant; which division was certified to the supreme court: *Held*, that the question could not be brought up on a certificate of division. There was not, in strictness, any cause in court; the insurmountable objection is, that the granting or refusing the motion, was a matter resting in the discretion of the court, and did not present a point that could be certified under the act of congress. Although the words of the act are general, that whenever any question shall occur before a circuit court, upon which the opinion of the judges shall be opposed, the point shall be certified, &c.; yet it is very certain, that this cannot embrace every question that may arise in the progress of a cause, from its commencement; there may be many motions made in the different stages of a cause, before trial, that could not be brought here under a certificate of division; such as motions for amendments, for commissions, for continuances, &c., and various other motions that arise in the progress of a suit, which, if brought up in this manner, would occasion great delay and expense; these, and all other questions resting in the discretion of the circuit court, are not to be reviewed here.¹

The questions which may be certified, are those which may arise on the trial of a case, and are such as may be presented upon the final hearing of a cause, or pleas to the jurisdiction of the court. The motion in the present case does not stand on stronger grounds than a motion for a new trial; and it has been decided in this court, in the case of the United States v. Daniel, 6 Wheat. 542, that a division of opinion upon such a motion cannot be brought here by a certificate of a division of opinion in the circuit court; and the reason assigned is, that the granting or refusing a new trial is a mere matter of discretion; and the refusal, although the grounds of the motion be spread upon the record, is no sufficient cause for a writ of error; the effect of the division is, that the motion is lost: so, in the present case, the effect of the division of opinion is, that the motion is lost, and the plaintiff is driven to a new suit.

The court do not mean to decide, definitely, that no question can be brought here upon a certificate of a division of opinion, unless the points arose upon the trial of the cause; but are very much induced to think, that such is the true construction of the act: but from the general words used, cases may possibly arise that we do not foresee.

CERTIFICATE of Division from the Circuit Court of West Tennessee.

*At September term 1825, an action of detinue was instituted in the [*287 circuit court, by John H. Davis against Alexander Braden, to recover a negro slave. During the progress of the suit, the plaintiff died, and the suit was revived in the name of Elizabeth Davis, his administratrix, on the 1st day of October 1830. Afterwards, the defendant, Alexander Braden, died; and at September term 1832, his death was suggested by the plaintiff; and at September term 1833, the court made an order as follows: "It appearing to the court, that the death of the defendant was suggested at the last term of this court, and no steps having been since taken to revive the suit against the representatives of said defendant, it is ordered that the same abate." Afterwards, at the same term, the order abating the suit was set aside, and a *scire facias* was issued to his executor; and on the return of the same, in September 1834, a motion to revive the suit against the executor of Alexander Braden was, upon argument, overruled. On a day after-

¹ See Wiggins v. Gray, 24 How. 308; United States v. Rosenburgh, 7 Wall. 580.

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wards, in the same term, the plaintiff's counsel moved to rescind this order; and the court directed the following to be entered of record, viz :

"This was an action of detinue, founded on a tort, brought by the plaintiff against Alexander Braden, the defendant, for the wrongful detention of a slave. The defendant, Braden, died, previous to September term 1832, before the suit could be tried. His death was suggested, at September term 1832, and a *scire facias* issued against Margaret Braden and Harvey Braden, his personal representatives, since the last term, returnable to the present term, to show cause why the said action should not be revived. The personal representatives, by their counsel, appeared, and upon argument of the motion, whether the said action could or should be revived against said personal representatives, the opinions of the judges on said point were opposed. Whereupon, upon motion of the plaintiff, by her attorney, that the point upon which said disagreement happened, may be stated, under the direction of the judges, and certified under the seal of the court, to the supreme court, to be finally decided : it is, therefore, ordered, that the foregoing statement of facts in relation to said disagreement, which is made under the direction of the judges, be certified, according to the request of the parties, and the law in that case made and provided."

Hunteman, for the defendant, stated, that the record presented but one question for the decision of this court. Can an action of *detinue, [288] founded on a wrongful detention of property, be revived against the executor or administrator of a deceased defendant? For the defendant, it is insisted, that it cannot.

The unlawful detention is the gist of the action. 1 Inst. 286 ; 1 Chitty Pl. 119. But this question has been put at rest in the state of Tennessee, by the very elaborate decision of the supreme court of that state, in the case of *Jones and Glass v. E. B. Littlefield*, 3 Yerg. 133. That case is decisive of this cause, and the court say, "an action of detinue, founded on a wrongful detention of property, cannot be revived against an administrator," &c. The instruction to the circuit court should be, that this suit cannot be revived against the personal representatives of Alexander Braden deceased.

No counsel appeared for the plaintiff.

THOMPSON, Justice, delivered the opinion of the court.—This was an action of detinue, brought against the defendant, for the wrongful detention of a slave. The defendant died previous to the term of the circuit court in the district of West Tennessee, in September 1832. His death was suggested at that term, and a *scire facias* afterwards issued against Margaret Braden and Harvey Braden, his personal representatives, returnable at the September term 1834 ; at which term, the parties appeared by their attorneys ; and the plaintiff's attorney moved to revive the suit against the executors of Braden, which motion, on argument, was overruled by the court, and the suit abated ; and at a subsequent day in the same term, the plaintiff's attorney moved the court to rescind the order refusing the motion to revive the suit ; and upon this motion, the judges were opposed in opinion whether the action could be revived against the personal representatives of the defendant ; and the case comes here on a certificate of a division of opinion.

This question cannot, we think, be brought up on a certificate of division

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of opinion in the circuit court ; there was not, in strictness, any cause in court. This suit had abated by the death of the defendant ; and the motion to revive it against his personal representatives had been denied, and the motion on which the division of opinion arose was to rescind that rule. This motion, however, being made at the same term in which the motion to revive had been overruled, this objection may not be conclusive ; but [*289] the insurmountable objection is, that the granting or refusing this motion was a matter resting in the discretion of the court, and did not present a point that can be certified under the act of congress.

Although the words of the act are general, that whenever any question shall occur before a circuit court, upon which the opinion of the judges shall be opposed, the point shall be certified, &c. ; yet it is very certain, that this cannot embrace every question that may arise in the progress of a cause, from its commencement. There may be many motions made in the different stages of a cause, before trial, that could not be brought here under a certificate of division ; such as motions for amendments, for commissions, for continuances, &c., and various other motions that arise in the progress of a suit ; which, if brought up in this manner, would occasion great delay and expense. These, and all other questions resting in the discretion of the circuit court, are not to be reviewed here.

The first proviso in this section of the act (2 U. S. Stat. 159, § 6) would seem very plainly to indicate, that the points which may be certified to this court, must arise upon some question at the trial : "Provided, that nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had, without prejudice to the merits." And this construction of the act is, in some measure, corroborated by the provision in the former act of 1793 (1 U. S. Stat. 334), for the like purpose ; providing for a division of opinion, when the court should be held by the district judge and one of the judges of the supreme court. That act is in terms restricted to questions arising upon a final hearing of a cause, or pleas to the jurisdiction of the court. The provision in the present act of 1802, was a substitute for that, as to the mode of disposing of the question. But there is nothing in this act affording grounds for the conclusion, that it was intended to enlarge the provision as to the questions that were to be brought up.

The motion in the present case does not stand on stronger grounds than a motion for a new trial ; and it has been decided in this court, in the case of the *United States v. Daniel*, 6 Wheat. 542, that a division of opinion upon such a motion cannot be brought here by a certificate of a division of opinion in the circuit court ; and the reason assigned is, that the granting or refusing a new trial is a mere matter of discretion ; and the refusal, although the grounds of the motion be spread upon the record, is no sufficient cause for a writ of error. *The effect of the division is, that [*290] the motion is lost ; so, in the present case, the effect of the division of opinion is, that the motion is lost, and the plaintiff is driven to a new suit.

It may be supposed, that the case of the *United States v. Wilson*, is an authority for entertaining the present question (7 Pet. 154) ; but that case differs essentially from this. That case was actually in court, and the motion on which the judges were opposed in opinion related to proceedings in the

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trial of the cause ; the prisoner having pleaded guilty, pronouncing judgment by the court was a part of the trial, and the question arose upon a motion of the district-attorney for judgment. It was not a matter resting in the discretion of the court, whether to give judgment or not ; the court was bound, either to pass sentence upon the prisoner, or to discharge him. The point upon which the judges were divided in opinion, did not relate to any matter resting in the discretion of the court, as to the nature or degree of punishment ; but whether the prisoner was punishable at all or not ; and that depended upon a question of law, growing out of the pardon of the prisoner, and in no respect rested in the discretion of the court. We do not mean to decide, definitively, that no question can be brought here upon a certificate of a division of opinion, unless the point arose upon the trial of the cause ; but we are very much induced to think, that such is the true construction of the act : but from the general words used, cases may possibly arise that we do not foresee. The question, however, brought up in the present case, being one resting entirely in the discretion of the court, is clearly not within the act ; and this court cannot, therefore, take cognisance of the question.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of West Tennessee, and on the point and question on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel : On consideration whereof, it is the opinion of this court, that it cannot take cognisance of the question certified, the case being one resting entirely in the discretion of the circuit court, and therefore, clearly not within the act of congress of the 29th of April 1802 : whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court.

*291] *RICHARD R. KEENE, Plaintiff in error, v. The Heirs of DANIEL CLARK.

Error to state court.

A writ of error was prosecuted to the supreme court of Louisiana, under the 25th section of the judiciary act of 1787, to revise the judgment of that court. The cause was dismissed, as it did not appear, that any question was presented in the court below, within the purview of the act ; the case having been decided upon a collateral matter, independent of, and wholly aside from, any such question.

ERROR to the Supreme Court of the state of Louisiana.

This case was submitted to the court on the record, by *Brent*, for the plaintiff in error.

Afterwards, *Coxe*, for the defendant, gave to the court the following statement, in support of a motion to dismiss the suit for want of jurisdiction. This suit was instituted to recover \$10,000, with interest. This was the alleged consideration money paid by Keene, for the conveyance of a tract of land described in the record. The ground of the claim is the cove-

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nant of warranty contained in the deed ; and the eviction of the plaintiff by a paramount title, viz., that of the United States. The only evidence of this eviction was, that the United States caused a survey to be made of this, among other lands. The district court of the state decided, that this survey did not amount to an eviction. This was affirmed in the supreme court.

The present writ of error is directed to the supreme court of Louisiana, by virtue of the 25th section of the judiciary act of 1789. The defendants in error submit, that the decision of the supreme court of Louisiana—that the matter proved, viz., the mere fact that the officers of the United States had surveyed the land in question, does not amount to an eviction, is not a decision against any claim, title or exemption, under the constitution, treaties or laws of the United States, nor in any way within the provisions of the judiciary act.

***STORY**, Justice, delivered the opinion of the court.—This is a writ of error to the supreme court of Louisiana, brought here under [*292 the 25th section of the judiciary act of 1789, ch. 20, to revise the judgment of that court. The suit was originally brought by the plaintiff in error, in the state district court, against the defendants in error, as heirs and representatives of Daniel Clark, to recover the purchase-money and interest for a certain tract of land, situate near Baton Rouge, between the rivers Perdido and Mississippi, east and west, and the thirty-first degree of north latitude, and the river Iberville, north and south ; which Clark sold to the plaintiff in error, in 1807, for \$10,000. The petition states, that Clark derived his title thereto from or through a grant of the same from the Spanish government, after the treaty of St. Ildefonso, in the year 1800 ; by which it was ceded to France by Spain ; and that France afterwards, in 1803, ceded it to the United States as a part of Louisiana ; and that in virtue thereof, the United States acquired a just title thereto, and under the acts of congress, have entire possession of the same. And the petitioner refers to certain accompanying documents, marked No. 1 and 2, to prove the sale to him, and the occupation and possession of the United States. The defendants in error pleaded the general issue ; and judgment was given in the state district court for them. The plaintiff in error then carried the same, by appeal, to the supreme court of Louisiana ; and the only point that appears there to have been raised or decided was, whether the plaintiff in error had been evicted from the land, or not.

According to the practice in Louisiana, the opinion of the supreme court is stated on the record. After reciting the state of the pleadings, it proceeds as follows : “The plaintiff contends, he showed an eviction, as the evidence establishes, that the whole land along the stream, on which the premises are situated, from its source to its mouth, was surveyed by order of the United States. It does not appear to us, that the district court erred. It is true, the surveyors must have necessarily passed near the plaintiff’s land, in effecting the survey. It does not appear to us, that it was occupied, or that any person on it was thereby disturbed. And then, after adverting to the case of *Bessy v. Pintade*, the court added, “the present case differs from that, in this, that here, the United States have directed an act of ownership over a vast tract of country, some small part of which may well be supposed to have been lawfully possessed and even owned by

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*individuals. This does not appear to us to amount to a denial of title of any of these individuals; much less an eviction in this particular case." This is the whole of the opinion of the court; from which it is apparent, that the judgment did not turn upon any question within the purview of the 25th section of the judiciary act of 1789, ch. 20; but wholly upon a collateral matter, independent of, and wholly aside from, any such question. It was merely a decision, that a public survey, under the authority of the United States, of a large tract of country, including the premises, was not, *per se*, an eviction of the plaintiff in error.

Upon the grounds, therefore, of the doctrine already stated by this court at this term, in the case of *Crowell v. Randell* (*post*, p. 368), the cause must be dismissed for want of jurisdiction.

Writ of error dismissed.

*294] *THOMAS LELAND and CYNTHIA B. LELAND, his wife, LEMUEL HASTINGS, GEORGE CARLTON and ELIZABETH WAITE CARLTON, his wife, WILLIAM JONES HASTINGS, JONATHAN JENKS HASTINGS, LAMBERT HASTINGS, JOEL HASTINGS, HUBBARD HASTINGS and HARRIET MARIA HASTINGS, Plaintiffs, v. DAVID WILKINSON.

Private statutes.

Cynthia Jenks, on a petition to the general assembly of Rhode Island, representing that she was the executrix of the last will and testament of Jonathan Jenks, late of Winchester, in the state of New Hampshire, deceased; and that the personal property being insufficient to pay the debts of the estate, she obtained authority from the judge of probate to make sale of so much of the real estate of the deceased as should be necessary to pay the debts; and that under this authority she sold and conveyed certain lands in the state of Rhode Island, as belonging to the estate, and received a part of the consideration-money, and the balance was to be paid when the deed executed by the petitioner should be ratified by the general assembly; the residue of the purchase-money was represented to be absolutely necessary to pay the debts of the estate, and a ratification of the deed, &c., was prayed. In the lower house, June 1792, "it was voted and resolved, that the said petition be received, and that the said deed and the same is hereby ratified and confirmed, so far as respects the conveyance of any right or interest in said estate, mentioned in said deed, which belonged to the said Jonathan Jenks, at the time of his decease;" and in the upper house, this resolve was read the same day, and concurred in. The purchasers, under the deed sanctioned, received all the interest in the promises which had been vested in Jonathan Jenks, and which, on his death, vested in his heirs or devisees; the act of the legislature and the deed are unconditional, and neither the heirs of Cynthia Jenks, nor any other persons can impeach the deed, by evidence of facts prior to the act of confirmation.

The power of the legislature of Rhode Island in relation to the confirmation of such sales of real estate, is greater than the strict judicial power; they may sanction past transactions, where vested rights are not disturbed; while the court can only authorize a title to be made in future.

CERTIFICATE of Division from the Circuit Court of Rhode Island.

The case was submitted to the court, by *Whipple*, for the defendant, on a printed argument. No counsel appeared for the plaintiff.

MCLEAN, Justice, delivered the opinion of the court.—The matters in controversy in this case are contained in certain points, on which the judges of the circuit court for the district of *Rhode Island were divided; *295] and which have been certified for decision to this court, under the act of congress.

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The plaintiffs brought their action of ejectment against the defendant, to recover possession of the land in controversy; and they claim as the heirs-at-law of Cynthia Jenks. It was proved, that Jonathan Jenks, who was seised of the premises, and who died in January 1787, devised the land to his daughter Cynthia, a few day before his decease. The defendant's counsel gave in evidence a certain deed, executed by Cynthia Jenks, executrix, to Moses Brown and Ariel Wilkinson, dated the 12th of November 1791, and a certain bond or warrant of the same date. Also the petition of Cynthia Jenks to the general assembly of Rhode Island, representing that she was executrix of the last will and testament of Jonathan Jenks, late of Winchester, in the state of New Hampshire, deceased; and that the personal property being insufficient to pay the debts of the estate, she obtained authority from the judge of probate to make sale of so much of the real estate of the deceased as should be necessary to pay the debts. And that under this authority she sold and conveyed certain lands, in the state of Rhode Island, as belonging to the estate, and received a part of the consideration-money; and the balance was to be paid, when the deed executed by the petitioner, should be ratified by the general assembly. The residue of the purchase-money was represented to be absolutely necessary to pay the debts of the estate, and a ratification of the deed, &c., was prayed. In the lower house, June 1792, "it was voted and resolved, that the said petition be received, and that the said deed and the same is hereby ratified and confirmed, so far as respects the conveyance of any right or interest in said estate, mentioned in said deed, which belonged to the said Jonathan Jenks, at the time of his decease." And in the upper house, this resolve was read the same day, and concurred in.

The questions adjourned to this court are as follows:

1. Whether the confirmatory act, above stated, is sufficient to divest the title of the plaintiffs, if the sale of Cynthia Jenks, the executrix, confirmed by that act, was not necessary to pay the debts of her testator, Jonathan Jenks?

2. Whether the burden of proof of the existence of such debts, and the insufficiency of the personal estate, and also of the real *estate, which the said Jonathan Jenks, by his said will, authorized his executors to [^{*296} sell, and pay the same, or of either of said points, is on the defendant?

3. Whether the said confirmatory act is *prima facie* evidence of the existence of such debts, and of such insufficiency of personal estate and real estate, so authorized to be sold as aforesaid?

4. Whether the defendant is to be deemed and held to be a purchaser for a valuable consideration, *bond fide*, and without notice; so that he can protect himself under his title aforesaid; notwithstanding there might have been no deficiency of assets, and no debts of the testator remaining unpaid, at the time of the sale of Cynthia Jenks, executrix as aforesaid, and the passage of the confirmatory act aforesaid?

5. Whether the description of the demanded premises in the said deed of Cynthia Jenks, taken in connection with the confirmatory act, is sufficient in law to divest the plaintiff's title to the same, and convey the same to the grantees?

6. Whether the recital of the license of the judge of probate in New Hampshire, contained in the deed of Cynthia Jenks, dated November 12th,

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1791, and the recital of, and reference to, said license, in the petition of the said Cynthia to the legislature, and the act passed, is *prima facie* evidence of such license?

The whole of these questions, with the exception of a part of the fifth, that refers to a description of the premises, and which is not so stated as to enable the court to decide it, may be included in the simple inquiry, whether the grantees in the deed, confirmed by the legislature, took an absolute title to the premises in dispute. If this inquiry be answered in the affirmative, there is an end to all further inquiries; and if in the negative, it follows, that the title and all the proceedings referred to, could only be considered as *prima facie* evidence of the facts represented.

In 1829, this case was brought before this court by writ of error; and the court then decided, that the legislature of Rhode Island had the power to pass the above act. (2 Pet. 827.) And the only question which remains for consideration is, the effect of such legislative act. If the legislature had power to confirm the deed in question, is it not made absolute by the confirmatory act? That such is the character of a title, made by an executor, under an order of court, is admitted; and is it not clear, that the sanction of the legislature must produce the same effect? *In this respect, *297] the power of the legislature of Rhode Island is greater than the strictly judicial power; for they may sanction past transactions, where vested rights are not disturbed; while the court can only authorize a title to be made in future. No fraud is alleged between the purchasers and executrix; and the presumption is, that they acted in good faith. Nor does it appear, that the rights of strangers were affected by the sale.

The purchasers, then under the deed sanctioned, received all the interest in the premises which had been vested in Jonathan Jenks, and which, on his death, vested in his heirs or devisees. The act of the legislature, and the deed, are unconditional; and neither the heirs of Cynthia Jenks, nor any other persons, can impeach the deed, by evidence of facts prior to the act of confirmation. The legislature would have investigated the facts, and confirmed the deed, to but little purpose, if it is to be considered only as *prima facie* evidence of title. In this view, it would be necessary, in order to resist the title set up by the plaintiffs, to show that the administratrix proceeded regularly in her acts of administration; and that the sale of the real estate of the deceased in Rhode Island, was necessary to pay debts. But this is not the nature of the title received by the purchasers. So far as the deed, under the sanctions given to it, purports to convey all the right to the premises, of which Jonathan Jenks was seised, at the time of his decease, was conveyed absolutely.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Rhode Island, and on the points and questions on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the grantees in the deed confirmed by the legislature of Rhode Island, took an absolute title to the premises in dispute in this cause: which opinion answers the first, second, third, fourth and sixth questions so

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certified ; and also the fifth question, except that part of said fifth question which refers to a description of the premises, and which is not so stated as to enable this court to express an opinion ; all of which is hereby ordered and adjudged, by this court, to be certified to the said circuit court.

*BENJAMIN I. GILMAN, Plaintiff in error, v. PETER G. RIVES. [*298]

Abatement.—Non-joinder of proper defendant.—Effect of judgment on plea in abatement.

Gilman obtained a judgment in an action of debt, instituted in the circuit court of Kentucky, against Rives and Lyne ; and he instituted a suit against Rives, on the judgment, in the circuit court of West Tennessee ; the declaration stated the judgment to have been joint, against Rives and Lyne ; and no reason was assigned in it, why Lyne was not a party to the suit ; the defendant, Rives, demurred, and the circuit court sustained the demurrer : the judgment of the circuit court was affirmed.

Generally speaking, all joint obligors, and other persons bound by covenants, contract or *quasi* contract, ought to be made parties to the suit ; and the plaintiff may be compelled to join them all, by a plea in abatement for the non-joinder. But such an objection can only be taken advantage of by a plea in abatement ; for if one party only is sued, it is not matter in bar of the suit, or in arrest of judgment, upon the finding of the jury, or of variance in evidence upon the trial. But the same doctrine does not appear to have been acted upon, to the full extent, in cases of recognisance and judgments, and other matters of record, such as bonds to the crown ; if, in cases of this sort, it appears by the declaration, or other pleadings, that there is another joint-debtor who is not sued, although it is not averred that he is living, the objection need not be pleaded in abatement, but it may be taken advantage of, upon demurrer, or in arrest of judgment.

A judgment that a declaration is bad in substance (which alone, and not matter of form, is the ground of a general demurrer) can never be pleaded as a bar to a good declaration for the same cause of action ; the judgment is, in no just sense, a judgment upon the merits.¹

ERROR to the Circuit Court of West Tennessee. The case is stated at large in the opinion of the court.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court for the district of West Tennessee. The plaintiff in error, Gilman, brought an action of debt against the defendant in error, Rives, upon a joint judgment rendered in his favor against Rives and one Leonard H. Lyne, in the circuit court for the district of Kentucky. The declaration is in the following terms :

"For that, whereas, the said Benjamin Ives Gilman, jun., heretofore, to wit, at the November term, in the year of our Lord 1829, of the seventh circuit court of the United States, sitting in and for the district of Kentucky, at Frankford, in said state, before, &c., by the consideration and judgment of the said court, recovered against the *said Peter G. Rives and one Leonard H. Lyne, the sum of \$6860, then and there [*299] adjudged to the said B. I. Gilman, jun., for his damages, which he had sustained by reason of the non-performance of the defendant and the said Leonard H. Lyne, of certain promises and undertakings then lately made by them to the plaintiff, and also his costs and charges by him about his suit in that behalf expended, whereof the said Peter G. Rives, the present defendant, and the said Leonard H. Lyne, were convicted, as by the record,

¹ Gould v. Evansville and Crawfordsville Railroad Co., 91 U. S. 526; Fleming v. Insurance Co., 12 Penn. St. 391.

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&c., which said judgment still remains in full force and effect, &c.; whereby an action hath accrued to him, the said B. I. Gilman, jun., to demand and have of the defendant the said sum of \$6860 above demanded; yet the defendant, though often requested, &c."

To this declaration, there was a general demurrer filed; and upon the joinder in demurrer, the circuit court gave judgment in favor of the defendant, "that the declaration aforesaid and the matters in the same contained, are not good and sufficient in law, to enable the plaintiff to have and maintain his action aforesaid," &c. The present writ of error is brought to revise that judgment.

The sole question in the case is, whether the action was maintainable against the defendant Rives alone, the judgment appearing on the face of the declaration to be a joint one against him and Lyne, and no reason being assigned in the declaration, why Lyne was not made a party thereto. If it had appeared upon the face of the declaration, that Lyne was dead, or out of the jurisdiction of the court, or incapable of being made a party to the suit, there is no doubt, that the action might well be maintained against the other judgment-debtor. The question then is, whether the non-joinder of Lyne, as a co-defendant, and the omission to aver any reason for such non-joinder, are fatal defects, upon a general demurrer to a declaration thus framed. The matter might, without doubt, have been pleaded in abatement; and not having been so pleaded, it is contended, that it cannot be taken advantage of, upon general demurrer.

The doctrine, which is to govern in this case, is of a purely technical nature, and turns upon the rules of good pleading. We have certainly no desire to encourage exceptions of this sort, for they are generally of a nature wholly beside the merits of the case. But still, if they are founded in the general rules of pleading, and are supported by authority, it is our duty not to disregard them.

Generally speaking, all joint obligors, and other persons bound by covenants, contract, or *quasi* contract, ought to be made parties to the *300] *suit; and the plaintiff may be compelled to join them all, by a plea in abatement for the non-joinder. But such an objection can only be taken advantage of, by a plea in abatement; for if one party only is sued, it is not matter in bar of the suit, or in arrest of judgment, upon the finding of the jury, or of variance in evidence, upon the trial. Thus, for instance, if one obligor be sued upon a joint bond, and upon *oyer*, the bond is spread upon the record, and thereby becomes a part of the declaration, by which it appears, that another person is named as a joint obligor, the party should not demur, but should plead in abatement, that the other sealed and delivered the bond, and was in full life; for *non constat*, upon the *oyer*, that the other did seal and deliver the bond. So, it was held, in *Whelpdale's Case*, 5 Co. 119, and in *Cabell v. Vaughan*, 1 Saund. 291, and that doctrine has been constantly referred to ever since, and was fully confirmed in *Rice v. Shute*, 5 Burr. 2611. But if it should appear upon the face of the declaration, or other pleading of the plaintiff, that another jointly sealed the bond with the defendant, and that both are still living, the court will arrest the judgment, and the objection may be taken by demurrer; because the plaintiff himself shows, that another ought to be joined; and it would be absurd to compel defendant to plead the facts, which are already

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admitted. It is unnecessary to do more to support this distinction than to refer to the learned note of Serjeant Williams, to the case of *Cabell v. Vaughan*, 1 Saund. 291, note 4, where all the leading authorities are collected and commented on.

But the same doctrine does not appear to have been acted upon, to the full extent, in cases of recognisance and judgments, and other matters of record, such as bonds to the crown. If, in cases of this sort, it appears by the declaration, or other pleadings, that there is another joint-debtor, who is not sued, although it is not averred that he is living; the objection need not be pleaded in abatement, but it may be taken advantage of, upon the demurrer, or in arrest of judgment. Thus, in *Blackwell v. Ashton*, Aleyn 21, a *scire facias* was brought against three parties, upon a recognisance acknowledged by them and the principal, jointly and severally; and upon a demurrer, the writ abated, by good advisement, as the report says, because this being found upon a record, the plaintiff ought to show forth the cause of the variance from the record. But if an action be brought upon a bond, in the like case, there the defendant ought to show, that it was made by them and others in full life, not named in the writ; *because the court shall not intend, that the bond was sealed and delivered by all that are named in it. There is another report of the same case, or of another case between the same parties, in the preceding term of the court, in Style 50, in which the points are somewhat differently stated; but it is a very loose note. The case in Aleyn 21, has been fully recognised and acted on in the recent cases in the court of exchequer. In *Rex v. Young*, 2 Anstr. 448, there was a *scire facias* against two joint sureties upon a recognisance to the king; and the declaration stated, that four persons became bound by the recognisance, without averring the other to be dead or outlawed. There was a plea put in by the defendant, to which the crown replied; and upon general demurrer, the plea and replication were held to be bad. An exception was taken to the declaration, that all the parties were not joined; and it was held a fatal objection, by the court. Lord Chief Baron MACDONALD, in declaring the opinion of the court, said: "The defendant, however, rests on an objection to the declaration, that two of those jointly bound in the recognisance are sued, without the rest, and without averring that the others are dead. And it is clear, that this is a valid objection to it. But it has been contended, that the objection should have been taken by a plea in abatement. That rule holds, where the fact does not appear upon the declaration; but where it already appears on the declaration, that others ought to have been joined, and are not, no plea is necessary. It is clear, from the cases cited in 5 Burr. 2611, and that in Aleyn, which corresponds very accurately with the present." The same point was adjudged, in the same way, by the same court, in the subsequent case of *Rex v. Chapman*, 3 Anstr. 811.(a)

As a question, therefore, of authority, the doctrine seems well settled; and we cannot say, that upon principle there is not good sense in requiring the plaintiff in his suit, to assign some reason, why, when he declares upon

(a) See also the note of Messrs. Pattison and Williams to the last edition of Saunders. 1 Saund. 291, note c.

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a joint judgment, he does not join a party, whom he states in his declaration to be jointly liable.

The objection may be urged, that the judgment upon a general demurrer, in this case, will be a good bar to any future suit brought against the present defendant, upon the same debt, or against him and the other judgment-debtor. We are of a different opinion as to both, if the declaration be properly framed; for a judgment, that a declaration is bad in substance [302] (which alone, and not matter of form, *is the ground of a general demurrer), can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is, in no just sense, a judgment upon the merits. If authority be wanting for this position, it will be found in the case of *Lepping v. Kedgewin*, 1 Mod. 207; where, to an action in the nature of a conspiracy, the defendant pleaded a bad plea, and judgment was in fact rendered against the plaintiff for the insufficiency of his declaration; but by mistake or design, the judgment was entered, that the plea was good, and *ideo consideratum*, instead of that the declaration was bad and insufficient, and *ideo consideratum*. Upon a second suit for the same cause of action, the former judgment was pleaded, and upon demurrer, held no bar. And the court held, that notwithstanding this mistake in the entry, if the plea was bad, it was no estoppel; and the court accordingly took notice of the plea, and said upon that matter, as it falls out to be good or otherwise, the second action is maintainable or not. And judgment was accordingly given, *nisi*, for the plaintiff. But if the judgment had been properly rendered, that the declaration was insufficient, &c., there was no doubt, that the former judgment was no bar.

But to avoid all possible difficulty on this point, in our own judgment, we shall state the cause for which the declaration is held bad; so that it cannot be a bar to any suit properly brought on the judgment. The judgment of the circuit court is, therefore, affirmed, with costs.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of West Tennessee, and it was argued by counsel: On consideration whereof, inasmuch as it appears to the court that the declaration and the matters therein contained are not sufficient in law for the said Gilman to have or maintain his aforesaid action against the said Rives, because it appears upon the declaration that there is another joint judgment-debtor, the said Lyne, who is not sued, nor any reason assigned why he is not joined in the suit; therefore, and for this cause, it is considered by the court, that the judgment of the said circuit court be and hereby is affirmed, with costs.

*UNITED STATES, Appellants, v. STEPHEN D. FERNANDEZ and others.

Florida land-claims.—Indian lands.—Spanish grants.

A grant of land in Florida, within the Indian boundary, by the governor, acting under the crown of Spain, before the cession of Florida to the United States, was confirmed to the grantee, by the decree of the judge of the eastern district of Florida. The decree was affirmed on appeal.

The subject of grants of land within the Indian boundary, which had not, by any official act, been declared a part of the royal domain, was fully and ably considered in the case of *Johnson v. McIntosh*, 8 Wheat. 543. Every European government claimed and exercised the right of granting lands, while in the occupation of the Indians.

The grants of land, in the possession of the Indians, by the governor of Florida, under the crown of Spain, were good to pass the right of the crown; the grants severed them from the royal domain, so that they became private property; which was not ceded to the United States by the treaty with Spain.

APPEAL from the Superior Court of East Florida.

The case was presented to the court, by *Butler*, Attorney-General, for the United States; and by *White*, for the appellants.

BALDWIN, Justice, delivered the opinion of the court.—This is an appeal from the decree of the judge of the superior court for the eastern district of Florida, confirming the claim of the appellants to 16,000 acres of land, pursuant to the acts of congress for the adjustment of land-claims in Florida. In the court below, the petition was in the form prescribed by law; presenting a proper case for the exercise of the jurisdiction of the court.

The claim of the petitioner was founded on his application to the governor of East Florida, for a grant of 16,000 acres of land, in consideration of his services to the Spanish government; which was granted to him, at the place specified, with directions to make the surveys there, or at any other that may be vacant. This grant was made the 16th of November 1817; and surveyed in May and June 1818, in four different tracts.

Various objections were made in the court below to the confirmation of the title, which have not been pressed here, as they have been overruled in the previous decisions of this court. The only one which has not been distinctly considered, is to that part of the land surveyed, which lies within the Indian boundary; where, it is contended, the governor had no power to grant lands. In the case of *Arredondo*, the grant was of lands within the Indian boundary; but which, by a proceeding in the nature of an inquest of office at the common law, were declared to be annexed to the royal domain, by their abandonment by the Indians. (6 Pet. 741.) In the case of *Mitchell*, the original grant was made by the Indians themselves, of lands which had not reverted or been ceded to the crown; so that the broad question of the validity of an original grant, by the governor, of lands within the Indian boundary, which had not by any official act been decreed to form a part of the royal domain, has never come directly before us. It is now distinctly presented for our adjudication, and ought to be decided.

This subject was so fully and ably considered in *Johnson v. McIntosh*, that we have only to refer to the language of the court, to show that every European government claimed and exercised the right of granting lands,

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while in the occupation of the Indians. 8 Wheat. 574, 579. The proclamation of 1763, which was the law of Florida while that province was under the dominion of Great Britain, gave express authority to the governor of that province to grant bounty lands to the officers and soldiers entitled under that proclamation. No other restrictions were imposed on them, than that they should not grant any lands beyond the bounds of their respective governments, as described in their commissions. The general prohibition to grant lands reserved to the Indians, was confined to the governors of the other colonies or plantations in America. (6 Laws United States, 446.)

The government of East Florida was declared to be bounded, west by the Appalachicola and the Gulf of Mexico, north by a line drawn from the junction of the Chattahoochie and Flint rivers to the source of the St. Mary's river, and by the course of that river to the Atlantic ocean, and to the east and south by the Atlantic ocean and the Gulf of Mexico, including all islands within six leagues of the sea coast. (6 Laws 444.) Under the British government, then, the governor of East Florida had express power to make grants of lands in the possession of the Indians. Spain never made any formal designation of boundary between the two provinces ; but practically, West Florida *extended east of the Appalachicola to the St. Marks, within the eastern province, including the lands in question. [9 Pet. 738.]

It does not appear, that either government had ever established any definite boundary between them and the Indians in East Florida ; the evidence to the contrary is very strong, as appeared in the case of *Mitchell*, 9 Pet. 745 ; and as it appears in this record, p. 17, 19. Nor does there appear to have been any restriction on the powers of the governor to make grants of land, under Spain, other than those imposed on the governors under Great Britain ; both made grants, without regard to the land being in the possession of the Indians ; they were valid to pass the right of the crown, subject to their right of occupancy ; when that ceased, either by grant to individuals, with the consent of the local governors, by cession to the crown, or the abandonment by the Indians, the title of the grantee became complete.

On the general question, therefore, of the validity of grants of lands in East Florida in the possession of the Indians, we are of opinion, that they were good to pass the right of the crown ; the grant of the governor severed them from the royal domain, so that they became private property, which was not ceded to the United States by the treaty with Spain. We, therefore, adjudge the title of the appellee to be valid, and affirm the decree of the court below.

THIS cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was argued by counsel : On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said superior court for the district of East Florida in this cause be and the same is hereby affirmed.

UNITED STATES, Appellants, v. BERNARDO SEGUI, Appellee.Florida land-claims.*

A grant, by the Spanish government of a tract of land in Florida, confirmed. This court cannot attach any condition to a grant of absolute property in the whole of the land; it was made by the governor, in absolute property, with a promise of a title in form; he was the exclusive judge of the conditions to be imposed on his grant, and of their performance.

APPEAL from the Superior Court of East Florida.

This case was presented to the court, by *Butler*, Attorney-General, for the United States; and by *White*, for the appellee.

BALDWIN, Justice, delivered the opinion of the court.—This is an appeal from the decree of the judge of the superior court for the eastern district of Florida, confirming the claim of the appellee to 16,000 acres of land; pursuant to the acts of congress for the adjustment of land-claims in Florida. In the court below, the petition was in the form prescribed by law, presenting a proper case for the jurisdiction of the court.

The claim of the petitioner was founded on his application to the governor of East Florida, for a grant of 16,000 acres of land, in consideration of his services to the Spanish government; and for erecting machinery for the purpose of sawing timber. The grant was made by the governor, in absolute property, with a promise of a title in form. The date of the grant was the 6th of December 1814.

It has been suggested by the attorney-general, that though there was no express condition in the grant, one was implied from the consideration being in part the erection of a saw-mill. But we cannot attach any condition to a grant of absolute property in the whole quantity. It was exclusively for the governor to judge of the conditions to be imposed on his grant: he appears to have considered the services of the appellee a sufficient consideration, and made the grant absolute.

The land was surveyed in one tract, at the place called for in the grant, on the 2d of September 1818. On an inspection of the *whole [^{*307} record, we are of opinion, that the title of the petitioner to the land surveyed is valid; and therefore, affirm the decree of the court below.

THIS cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said superior court for the district of East Florida in this cause be and the same is hereby affirmed.

UNITED STATES v. BENJAMIN CHAIRES and others.Florida land-claims.*

A grant of land by the governor of East Florida, in consideration of services to the Spanish government, made before the cession of the territory of Florida to the United States, confirmed.

APPEAL from the Superior Court of East Florida.

This case was submitted to the court, by *Butler*, Attorney-General, for the United States; and by *White*, for the appellees.

BALDWIN, Justice, delivered the opinion of the court.—This is an appeal from a decree of the judge of the superior court for the eastern district of Florida, confirming the claim of the appellee to 20,000 acres of land, pursuant to the acts of congress for the adjustment of land-claims in Florida. In the court below, the petition was in the form prescribed by law, presenting a proper case for the jurisdiction of the court. The claim of the petitioner was founded on an application to the governor of East Florida, made by Don Jose de la Maza Arredondo, for a grant of 20,000 acres of land, in consideration of his services to the Spanish government; which was granted on the 20th of March 1817, at the place solicited, with a promise of a title in absolute property; and surveyed in one tract, on the 14th of September 1819. The petitioners also allege that they claim the whole land, by purchase from Arredondo. On an inspection of the record, we are of opinion, that the title of Arredondo was valid to all the land contained in the survey; and (without deciding on the claim of the petitioner as derived from him) that the claim of the petitioner to the same ought to be confirmed. The decree of the court below is, therefore, affirmed.

THIS cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said superior court for the district of East Florida in this cause be and the same is hereby affirmed.

309] *UNITED STATES, Appellants, v. CHARLES SETON, Appellee.Florida land-claims.*

Under a grant of the governor of Florida, prior to the cession of the same to the United States, of 16,000 acres of land, for the purpose of erecting a water-mill, a survey of 520 acres was made, and at another place, a survey of 15,680 acres was also made. The court held, that the first survey of 520 acres was valid, and that the survey of 15,680 was invalid; but that the grantee had a title to 15,480 acres of vacant land; which he had a right to have surveyed, adjoining the survey of 520 acres.

APPEAL from the Superior Court of East Florida. This was a claim to land in East Florida, under a concession made by Don Jose Coppinger, governor of the province of East Florida, then under the dominion of the king of Spain, on the 6th day of May 1816, to Charles Seton, the claimant.

The claimant, on the 26th day of April 1818, applied by petition to Governor Coppinger, for leave to build a water saw-mill on Nassau river, in

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East Florida, at a place called Roundabout, and for the right to the quantity of land which was customary for his supply of timber. On the 8th of May following, the governor, in consideration (as he stated in his decree made on said petition) of the benefit and utility which would redound to the improvement of the province, if what Don Charles Seton proposed, should be carried into effect, granted to him, without injury to a third person, that he might build a water saw-mill at the place which he solicited ; but, with the precise condition, that until he should establish said mill, said concession should be considered as not made, and without any value or effect, until that event took place. That then, in order that he might not be injured by the increased expenses which he was preparing to incur ; he might make use of the pine trees which were included in the square of five miles which he asked for : 15,630 acres of this land were surveyed by George J. F. Clarke, public surveyor of the province, agreeable to the calls of the concession, on the 1st of November 1816, which is stated in the petition to be adjoining to a tract of 370 acres, which had been before surveyed by said *Clarke, as a part of said 16,000 acres ; but it was alleged, that the certificate and plat of the 370 acres, had been mislaid or lost. The [*310 claimant also alleged in the petition, that, in the year 1817, he completed the building of said saw-mill, and that it was for some time in full operation.

The district-attorney, by his answer, filed on behalf of the United States, denied the power of the governor to make the concession ; and insisted that if he did possess competent power to make it, and if the condition was complied with, it gave to Seton no right of soil, but only a right to "use the pine trees which were comprehended in the square of five miles which he asked for ;" and that only while the mill was in operation : and that for several years past, Seton had entirely failed and neglected to keep the mill in operation, by which failure and neglect, he has lost all right, even to the use of the pine trees.

This claim was evidenced by a copy of the concession, certified by Thomas de Aguilar, late secretary of the government of this province, and by a duly certified copy of the survey and plat for 15,630 acres. A duly certified copy of another survey and plat, made by said Clarke, on the 16th of May 1816, for 520 acres, at the place called Roundabout, was also produced. It was in evidence, that Seton built the mill, in the year 1817 or 1818 (for the witnesses differed on this point), but all agreed, that it had not been in operation since 1819.

Upon this state of the case, three questions were submitted in the court below : 1st. Had the governor power to make the grant ? 2d. If he had, what interest vested in Seton, upon the establishment of the mill ? 3d. Does that interest, whatever it was, continue ? or did it cease with the destruction of said mill ?

The claim was confirmed : the first question being considered as settled, and the court being of opinion, that, upon the establishment of the mill, a full and complete title to the land itself vested in Seton, to which he is entitled, notwithstanding his neglect to keep it in operation. The United States appealed from this decree.

The case was argued by *Butler*, Attorney-General, for the United States; and by *White*, for the appellee.

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**Butler* stated, that if the court should consider the grant to the appellee a valid grant, it would be for them to decide, whether it should endure beyond the ground occupied as a mill. Was it not a grant on a condition subsequent, that the mill should be kept in order? The grant is not to be understood as giving the trees, until the mill was built—no further.

White, for the appellee, asked the attention of the court to the petition, which was for the right to use timber, until the mill should be built; and afterwards for a right to the land. These grants are protected by the provisions of the treaty, which gave three years after it was made to complete the condition. But in this case, the mill was built; and what afterwards took place was of no moment.

BALDWIN, Justice, delivered the opinion of the court.—This is an appeal from the decree of the judge of the superior court for the eastern district of Florida, confirming the claim of the appellee to 16,000 acres of land, pursuant to the acts of congress for the adjustment of land claims in Florida. In the court below, the petition was in due form, as prescribed by law, presenting a proper case for the exercise of jurisdiction by the court.

The claim of the petitioner was founded on his application to the governor of East Florida for a grant of 16,000 acres of land, for the purpose of erecting a water saw-mill thereon, and the supply of timber therefor; which was granted by the governor, in consideration of the benefits which would thereby redound to the province. The grant was made the 16th of May 1816, but with the precise condition, "that until he shall establish said mill, this concession shall be considered as not made, and without any value or effect until that event takes place." The mill was built in 1817, pursuant to this condition, and in due performance thereof. On the 16th of May 1816, a survey of 520 acres was made at the place called for by the petition and grant; another survey of the residue of 16,000 acres was surveyed at another place on the 16th of November 1816; the first survey was declared valid by the court below, the second was rejected. The claim was adjudged valid, and the survey of the residue of the land directed to be made at the place called for in the grant. On an inspection of the whole record, [312] we are of opinion, that the title of the petitioner is valid to the 520 acres surveyed at the place called for by the grant, and not valid as to the survey of 15,680 acres; but that his title is valid to 15,480 acres of vacant land, which he has a right to have surveyed, adjoining the said survey of 520 acres, according to the decree of the court below. Their decree is, therefore, affirmed.

THIS cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said superior court for the district of East Florida in this cause be and the same is hereby affirmed.

*UNITED STATES, Appellants, v. CHARLES F. SIBBALD, Appellee.

Florida land-claims.—Spanish treaty.

A petition was presented to the governor of Florida, before the cession of the territory to the United States, setting forth, that the petitioner was desirous of erecting machinery for sawing timber, &c., and asking "permission for that purpose, with the corresponding survey of the grant of land of five miles square, 16,000 acres, or its equivalent, in the event that this situation will not permit the said form; which land will insure the continued supply of timber; the permission was granted, without injury to third persons, under the express condition, that until the establishment of the mill, the grant of the land, which will be a square of five miles, in order that he may use the timber, shall be of no effect." A survey was made of 10,000 acres, but no more than that quantity could be had at the place described; and the residue of the grant, 6000 acres, was afterwards surveyed in other places, at the distances of twenty and thirty miles. In 1819, the grantee commenced the erection of a mill, which was afterwards carried away by floods; in 1827, another mill was commenced, which was destroyed by fire, in July 1828; and in October 1828, another mill was commenced, which went into operation in 1829. The superior court of East Florida confirmed the survey of 10,000 acres, and rejected the two surveys amounting to 6000 acres: *Held*, that the grantee was entitled to the whole 16,000 acres.

By the eighth article of the treaty of cession of Spain to the United States, the same time is allowed to the owners of land granted under the authority of Spain, to fulfil the conditions of their grants, after the date of the treaty, as was limited in the grants. It has been decided by this court, in the case of Arredondo, that as to individual rights, the treaty is to be considered as dated at its ratification.

It has been decided, in Arredondo's case, that that provision of the treaty as to the performance of the conditions in grants, is not confined to owners of land by occupancy or residence; but extends to persons who have a legal *seisin* and possession of land, in virtue of a grant; and that, in the situation of the province, and the claimants to land, at the time of the cession, it was enough, that they should show a performance of the condition *cy pres*.

APPEAL from the Superior Court of East Florida. This was a claim to land in East Florida, presented to the superior court of East Florida, by the appellee, founded on a concession for 16,000 acres of land, made by Don Jose Coppinger, governor of the province of East Florida, to Charles F. Sibbald, the claimant, on the 2d day of August 1816; for five miles square, or 16,000 acres of land.

On the 16th day of July 1816, the petitioner, Charles F. Sibbald, presented his petition to Governor Coppinger, supplicating his permission to construct a water saw-mill on the creek called Six Miles, *alias Little Trout creek, on the north side of the river St. John's and that of [*314] Nassau, the creeks of which empty their waters into the said St. John's river; with the corresponding surety for the grant of lands, embraced in a line of two and a half miles to each wind, making a square of five miles, or its equivalent, in the event that this situation will not permit the same form; which land, he says, will insure the continued supply of timber. On the 2d of August of the same year, the governor made his decree, granting the permission solicited; under the express condition, that until the establishment of the mill, the grant of the land, which will be of two miles and a half to each wind, making a square of five miles, in order that he may use the timber, &c., shall be of no effect; 10,000 acres of this land were surveyed upon Little Trout creek, agreeable to the calls of the grant; 4000 acres were surveyed by George J. F. Clarke, public surveyor, on the 8th day of February 1820, in Turnbull's swamp, at Mosquito, more than 100 miles to the southward from the first location, and between which and it there

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was no water communication, except by the open sea ; and the remaining 2000 acres were, on the 20th of February 1820, surveyed by said Clarke, at Bow Legs hammock, about the same distance to the west, and from the first survey, between which and those 2000 acres, there was no water communication at all.

The petitioner alleged, that in compliance with the condition of said grant, he, in the year 1819, expended \$6000 or \$8000 in the erection of a water saw-mill, which was nearly completed ; but that, owing to various difficulties, and the embarrassments of said province, the mill did not go into operation. That, since the cession of the Floridas to the United States, he had expended upwards of \$20,000 in the erection of a steam saw-mill on the tract of 10,000 acres, which was completed, and some time in full operation ; but that, in the month of July 1828, it was entirely destroyed by fire ; and that he had since commenced another, upon a much more extensive scale, this last had been completed since the filing of the petition in this case.

The answer of the district-attorney denied the power of the governor to make his grant ; and put the claimant to the proof of all the allegations contained in his petition, and insisted, that he had not complied with the condition of the concession. *That by a decree of Governor Coppering, [315] bearing date the 29th of October of the same year (White's Compilation), the term of six months was limited for the performance of the conditions of all grants of this nature ; and that it was then especially decreed by said governor, that all those grants, the conditions of which were not performed, at the expiration of said six months, should be null and void, and that the lands should be annexed to the class of public land ; which decree was, subsequently, to wit, on the 18th day of January 1819, by another decree of the same governor, fully affirmed ; and that the said Charles F. Sibbald did not erect the said saw-mill, within the said term of six months, and that, consequently, said concession, at the expiration thereof, became null and void, and the lands were annexed to the class of public lands.

The original concession in this case was not to be found in the archives ; but a copy, certified by Thomas de Aguilar, late secretary of the government of the province, was produced and proved. The proof in relation to the building of the mills, was substantially as stated in the petition, and a duly certified copy of the survey was also produced.

Points submitted on the part of the United States in the court below :

1. As to the power of the governor to make the grant. This question is considered by the court below, as settled by the several decisions of the court.
2. As to the validity of the surveys of 4000 and 2000 acres. This was also considered as settled against the claimant by the decision of this court ; and the claimant has appealed as to this part of the decree. 3. Did Sibbald, the grantee, perform the condition of this concession, either literally or substantially ? The superior court decided in favor of the petitioner, for 10,000 acres ; and against the claim of the petitioner to the 6000 acres. Both parties appealed to this court.

White, for the appellee.—This is what is called a mill grant—a grant of a prescribed quantity of land, on the express condition of establishing a water *saw-mill on the river St. John, and Cone's, or water-

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course called Six Mile or Trout creek. No specific time is limited in the decree, within which the mill was to be erected and put in operation. The governor contented himself with declaring that, until the memorialist should "settle (establish) the said mill, this grant shall be of no effect." The evidence in the record is ample, to show that this condition was fully complied with. The first mill was built in 1819, and carried away by a freshet. The second was built in 1827, and was in operation until 1828, when it was destroyed by fire, in July 1828. The third and last was built and went into operation in 1829. *United States v. Richard*, 8 Pet. 470. This is a case of a similar grant made by the same governor, which was confirmed by the supreme court, of a later date than this. In that case, as in this, the condition was not complied with, until after the 24th of January 1818. That case also decides, that these grants conveyed the lands, and not the timber merely. The grant to the claimant was made on the 2d of August 1816; and the certificate of the secretary bears date on the succeeding day.

The memorial asks for an order of survey, "together with suitable warrants to survey the ground;" and this is granted by the decree, "*concedo supervisso*." Under this authority, the surveyor-general surveyed the prescribed quantity of lands in detached parcels, on the 2d of May 1819, and on the 8th and 20th of February 1820. In *Richard's* case, above referred to, the surveys were made in detached parcels, and at a later period than this. *United States v. Clarke*, 8 Pet. 436. This, and the other cases decided at the same term, all affirm the authority of the governors of East Florida to make these grants.

Where the grants had issued before the 24th of January 1818, they recognise the authority of the governors to make orders of survey for the lands granted; and of the surveyor-general to execute them, after that date. But the court, in that case, rejected a claim to land, taken up under an order of survey, changing, as to a part of the land, the location specified in the original grant, which order was made on the 25th of January 1819; considering it as equivalent to a new grant: and the supposed analogy between that case and the one now under consideration, presents the only question which can arise here.

*A brief examination of that case, in its application to the one at the bar, will show the want of analogy between them. On the 3d of [*317] April 1816, George F. Clarke obtained a grant of five miles square, with a specific location "on the west side of St. John's river, above Black creek, at a place called White Spring." It was an absolute title for so much land at a specified place, with the usual proviso, "without prejudice to others." But Mr. Clarke was not satisfied with the land granted to him. Although there was sufficient vacant or public land at the specified place, to make up the quantity granted, yet it "did not answer his expectation;" and stating this fact in his petition to the governor, on the 25th of January 1819, he asked that the surveyor might be authorized to survey the one-half of the quantity specified in the first grant at another place, viz., "on the Hammock, called Lang's and Cone's, on Mizzel's lake." And the governor so ordered it. This raised the question in that case. The court held, that this change of location could not be authorized by the governor, after the 24th of January 1818; that the grant to Clarke conveyed the land described in it, and no other; and that a permit to survey other lands was, in effect, a new

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order of survey, which the governor had not power to make, on the 25th of January 1819. The principle is not questioned; but that is not the case of the present claimant.

The memorialist, Charles Sibbald, applied for a situation on which to erect his mill, which he specified, and for a grant of land of five miles square, "together with suitable warrants for the survey of ground, which occupies two and half miles on every side, making a square of five miles, or an equivalent quantity, in case this situation may not allow of the said figure." And "the same is granted" by the governor—*Consedo su permiso*. The reference in the decree to the memorial makes the latter instrument part of the decree itself. Then, it is a grant or concession of a tract of land two and a half miles on every side, making a square of five miles, on Trout creek, or an equivalent quantity elsewhere, in case that situation may not allow of the said figure. In other words, the grant, *quoad* the location, was alternative. It was to be surveyed on Trout creek, if that situation should allow of the said figure; that is, if a sufficient quantity of vacant or public land should be found there; but if not, authority was given to take up the deficiency, "its equivalent," elsewhere. *It was [318] apprehended, at the time the grant was issued (August 2d, 1816), that the requisite quantity of vacant or public land would not be found on Trout creek. This is manifest by the language of the memorial, and the decree which adopts it.

The power to change the location, as to such deficient quantity, to search for an equivalent elsewhere, was, therefore, given by the grant itself. It is not a new order of survey, granted by the governor, after the 24th of January 1818, authorizing a change of location, as in *Clarke's* case; but it is a contingent authority to change the location embodied in the grant given on the 2d of August 1816; at a time when the powers of the governor were not restrained by the limitations in the treaty. The total want of analogy between it and the case of the *United States v. Clarke*, will, therefore, be obvious.

The governor, in this case, grants to Charles Sibbald a tract of land of five miles square, to be surveyed at the place specified in his memorial, Trout creek, if a sufficient quantity of vacant or public land should be found there; but if not, then to be surveyed elsewhere, where an equivalent quantity of vacant land could be found. It was, in other words (so far as regards the quantity which might be deficient at Trout creek, from the want of a sufficient quantity of vacant lands there), a grant of land without a specific location; and the objection resolves into the inquiry, "Whether the governor had power to make such a grant, on the 2d of August 1816?" If the question were now of first impression, it would seem to be free from difficulty.

The governor grants to the petitioner a certain prescribed quantity of the public domain. What part of this domain would be embraced in the grant was uncertain, at the date of the concession, because of the uncertainty whether the prescribed quantity of public land could be found in the place where the petitioner desired, and the governor was willing that the grant should be laid: *sed id certum est quod certum reddi potest*; and the governor provided the means by which this certainty should be attained. The memorial asks for, and the decree grants, a certain quantity of land, at

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a particular place ; and, contingently, that a part of it may be surveyed elsewhere, "together with suitable warrants for a survey," of this land, or its equivalent. The decree allows the prayer, and directs the issue of "the appropriate certificate from the secretary's office, in customary form." That certificate in customary form was the copy of the memorial and decree ; and these were the warrant to the surveyor to determine the *contingency on which the authority to change the location would arise. [*319] The power was properly delegated to the surveyor, because the contingent authority to change the location depended upon a fact (whether there was a sufficient quantity of vacant land on Trout creek) which it was the appropriate duty of that officer to ascertain. The execution of the warrant by the survey of land, in pursuance of the authority thus given, rendered certain that (the location of the land) which was before uncertain, and thus completed the petitioner's title.

But looking to the decisions heretofore made on the various cases from Florida, even this argument seems unnecessary. The treaty declares valid all grants made by "his Catholic Majesty, or his lawful authorities." That the governor of East Florida was one of these lawful authorities, was decided in *Clarke's Case*. The governor of East Florida, who, it is thus ascertained, was authorized to grant lands in that territory, did, in point of fact, make this grant ; with this contingent authority to change the location, in due form. And the court say, in that case, "a grant made by a governor, if authorized to grant lands in his province, is *prima facie* evidence that his power was not exceeded. The connection between the crown and the governor justifies the presumption, that he acts according to his orders. Should he disobey them, his hopes are blasted, and he exposes himself to punishment. His orders are known to himself and those from whom they proceed, but may not be known to the world." This was but a reiteration of the principle decided in the case of *Arredondo* ; and the court add, "he who would controvert a grant executed by the lawful authority, with all the solemnities required by law, takes upon himself the burden of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud." The time was, when these principles were resisted with the utmost confidence ; but they have now the sanction of judicial authority.

This grant by Governor Copinger, with the contingent authority to change the location, then, is *prima facie* evidence that he did not exceed his power in making it. But still further, it is entitled to the same consideration in this court as it would have received, "if the territories had remained under the jurisdiction of his Catholic Majesty," by the authorities of Spain. *We have an opportunity to know what that consideration was. The grant was made in 1816 ; the exchange of flags took [*320] place in 1822. During the intervening time, the territories remained "under the jurisdiction of his Catholic Majesty."

The surveyor is entitled to the benefit of the principle which is common to all officers charged with the performance of public duties. Under the grant of Governor Copinger, the lands were surveyed, so far as vacant lands were found, at the spot designated by the grant ; and when these were exhausted, the surveyor sought, as he was required to do by the terms of the grant, an equivalent elsewhere, and returned his surveys to the

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proper office, as he was bound to do. The presumption that he did these things, *in alia verba*, that he did his duty, is the necessary result of the principle. How it corresponded with the fact, is manifest from the conduct of the Spanish authorities.

The memorialist took possession of his lands, built and rebuilt his mills; and his title was never questioned by those authorities. It seems wholly unnecessary to extend these remarks.

The *Attorney-General*, for the United States, contended, that there were some material words in the grant to *Richard* (8 Pet. 470), which are not to be found in the grant under the consideration of the court. The words are, in *Richard's Case*, "a grant of an equivalent quantity." This grant is also of a square of five miles; and the plain import of the terms is, that the surveys shall not be disconnected. The grant is made on the limited application for land at a place designated, for 16,000 acres. Under this grant, 10,000 acres were surveyed at this place; and afterwards, two tracts 100 miles off, one of 4000, and one of 2000 acres. The court of Florida on this account properly refused to confirm the last two surveys.

There is another ground of objection. Sibbald had not performed the condition of the grant. It is expressly declared, that until the condition is performed, it shall have no effect. The saw-mill was not constructed until three years after the grant was made. In the interval, on the 29th of October 1819, Governor Coppering had made an order limiting the execution of all such grants to six months. *White's Compilation* 250. It was entirely competent for Governor Coppering to make an order [limiting the performance of such a condition to six months (*Arredondo's Case*, 6 Pet. 691); and no title vested under the grant, until the condition was executed; or, if he had, until performance, an equitable title, he was bound to comply with the condition.

If the petition of Sibbald had prayed for an equivalent in land elsewhere, in the event of his not being able to obtain the requisite quantity at one place; no objection on the ground of the severance of the surveys would be made. But the petition is for an equivalent at the place. No permission from Governor Coppering to take the land in any other place is shown; and the act of the surveyor without such authority is of no avail. In *Clarke's Case* the words are, "or its equivalent." 8 Pet. 440. But the court decided, that the land described in the petition, and no more, was granted.

BALDWIN, Justice, delivered the opinion of the court. - These are cross appeals from the decree of the judge of the superior court of East Florida, on the petition of Sibbald; praying for a confirmation of his claim to 16,000 acres of land, pursuant to the acts of congress for adjusting land-claims in Florida. The petition was in the form prescribed by law, presenting a case proper for the exercise of the jurisdiction of the court below.

On the 16th of July 1816, the petitioner applied to the governor of East Florida, setting forth, that he was desirous of erecting machinery for sawing timber on Little Trout creek, on the north side of the river St. John's and that of Nassau: "he asks permission for that purpose, with the corresponding surety of the grant of land of five miles square, or its equivalent, in the event that this situation will not permit the said form; which land will insure the continued supply of timber." On the 2d of August 1816, the

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governor decrees, "the permission solicited by this party is granted, without injury to third persons; under the express condition, that until the establishment of the mill, the grant of the land, which will be a square of five miles, in order that he may use the timber, shall be of no effect," &c. Pursuant to this grant, a survey was made, on the 2d of May 1819, of 10,000 acres, at the place called for in the grant. In February 1820, 4000 acres were surveyed in another place, called Turnbull's swamp, at the distance of thirty miles from the first survey; and afterwards, the residue 2000 acres, was surveyed, *at a place called Bow Legs Hammock, at the distance of twenty or thirty miles. In 1819, Sibbald commenced [*322 the erection of a saw-mill on the 10,000 acre tract, and continued it, till its completion, except the dam; which would have been completed, had not the negroes and horses employed been stolen; and while the millwright was absent in pursuit of them, the dam was carried away by a freshet. The work was then abandoned, after an expenditure of more than \$5000. In September 1827, another mill was built and in operation; which was destroyed by fire, in July 1828. Another was commenced in October 1828, which went into operation in June 1829, and so continues to the present time; is of seventy horse power, and calculated to saw 20,000 feet of lumber a day. By the decree of the court below, the claim of the petitioner was confirmed as to the 10,000 acre survey on Trout creek, and rejected as to the two remaining surveys of 4000, and 2000 acres; from which decree both parties appealed. Various objections to the claim were made on the hearing, but only two were relied on here.

1. That the grant was on a condition precedent, which was not begun to be performed, till the grant became forfeited by the order of the governor, made the 29th of October 1818, declaring all grants made in consideration of mechanical improvements to be made, to be void, if the condition were not performed in six months. It is unnecessary to decide on the effect of this order; or whether by the acts which authorize the courts of Missouri and Florida to decide on claims to land therein, congress intended to assert a right by forfeiture for condition broken, to lands which had been once legally granted. The evidence in this and the other cases which have been decided, is very full and clear, that no grant has ever been annulled or revoked by the Spanish authorities, for any cause; and that there is no instance of a governor having granted land which had been before granted on condition: and it may well be doubted, whether it would have been re-annexed to the royal domain had the province remained under the dominion of the king of Spain; nor is there any provision of any law of congress, which specially requires the court to inquire into the performance of conditions on which grants were made.

By the eighth article of the treaty of cession by Spain to the United States, the same time is allowed to the owners of land so granted, to fulfil the conditions of their grants, after the date of the treaty, as [*323 was limited in the grants. We have heretofore decided, in the case of *Arredondo*, that as to individual rights, the treaty is to be considered as dated at its ratification (6 Pet. 748-9); the erection of a mill in 1819 or 1820, would, therefore, be in time to save a forfeiture. No time was limited in the grant; and no greater effect can be given to the governor's order fixing the time for the performance of conditions, than if the limitation had

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been contained in the grant. We have also decided, that this provision of the treaty is not confined to owners in possession of lands by occupancy or residence, but extends to all persons who have a legal seisin and possession of land in virtue of a grant (6 Pet. 743) : and that in the situation of the province and the claimants to land, at the time of the cession, it was enough, if they would show a performance of the condition *cy pres*. We are, therefore, of opinion, that the petitioner began the erection of the mill in time to save the forfeiture ; and that he has shown the performance of such acts as amount to a compliance with the condition, according to the rules of equity which govern these cases.

2. It is objected, that the terms of the grant do not authorize a survey of any part of the 16,000 acres, in any other than in the place called for. The petition was for a grant of 16,000 acres, or its equivalent, if its situation would not admit of this form ; the permission solicited was granted, which, by reference, makes the petition a part of the grant. It is in full proof, that the quantity could not be surveyed at the place designated, without interfering with land which had been previously granted ; which would have been contrary to the express words of the grant, "without injury to third persons." It is also in proof, without contradiction, that in order to obtain the 10,000 acres on Trout creek, it was necessary to go round one or two different tracts, and that no more could have been obtained, any where near it, of any value ; the shape of the survey is irregular, and not at all in conformity with the rules prescribed to surveyors ; which require the surveys to be in rectangular parallelograms, the front of which on rivers, creeks and roads not to exceed one-third of the depth. It was certainly the intention of the petitioner and the governor, that there should be a grant of five miles square, which was the usual quantity granted in consideration of the erection of mills ; and we think, that taking the petition and grant, together with the manifest intention of both parties, the equivalent for any deficiency on Trout creek may be referred to quantity *324] *rather than to the form of the survey. It would be a very rigid construction of the grant, to make the privilege of altering the shape of the survey, an equivalent for the loss of 6000 acres of land. That such was not the intention of the governor, is evident, from the evidence of Mr. Fernandez ; who testifies, that on ascertaining that part of the land had been previously granted, he informed the governor, who gave Sibbald the right to locate his grant at any vacant place suitable for the erection of a saw-mill. The surveyor-general of the province testified, that he filled that office in East Florida, from 1811 to 1821, that he located grants, by surveying any land which was designated by the grantee, to which no objection was made by any of the authorities under the Spanish government ; and which was considered an inherent privilege of the grantee, without any order from the government. We are, therefore, of opinion, that the title of the petitioner to the whole quantity of land specified in the grant is valid by the law of nations, of Spain, the United States, and the stipulations of the treaty between Spain and the United States for the cession of the Floridas to the latter ; and ought to be confirmed to him, according to the several surveys made as returned with the record. We do, therefore, order, adjudge and decree, that the decree of the court below, confirming the title of the petitioner to the 10,000 acres on Trout creek, be and the same is hereby affirmed.

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And proceeding to render such decree as the court below ought to have rendered, this court doth further order, adjudge and decree, that the decree of the court below, rejecting the claim of the petitioners to the land embraced in the surveys of 4000 acres, and of 2000 acres, as returned with the record, be and the same is hereby reversed and annulled. That the claim of the petitioner to the same be and the same is hereby confirmed and declared valid; and that the surveyor of public lands in the eastern district of Florida be and is hereby directed to do, and cause to be done, all the acts and things enjoined on him by law, in relation to the lands within said surveys.

THIS cause came on to be heard, on the transcript of the record from the superior court for the district of East Florida, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said superior court confirming the title of the petitioner to the 10,000 acres on *Trout creek, be and the same is [*325 hereby affirmed; and that the residue of the decree of the said superior court be and the same is hereby reversed and annulled. And this court, proceeding to render such decree as the said superior court ought to have rendered, doth order, adjudge and decree, that the claim of the petitioner to the land embraced in the surveys of 4000 acres and of 2000 acres, as returned with and contained in the record, is valid, and that the same be and is hereby confirmed. And it is further ordered, adjudged and decreed by this court, that the surveyor of public lands in the eastern district of Florida be and he is hereby directed to do, and cause to be done, all the acts and things enjoined on him by law, in relation to the lands within said survey. And that the said cause be and the same is hereby remanded to the said superior court to cause further to be done therein, what of right and according to law and justice, and in conformity to the opinion and decree of this court, ought to be done.

The same decree was given in the case of *Sibbald, appellant, v. United States.*

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Missouri land-claims.

John Smith, T., claimed a confirmation of a grant of land by the governor-general of Louisiana, made on the 11th of February 1796. Louisiana was ceded by France to the United States by the treaty of 1803; in 1811, surveys were made under the grant, of several tracts of land varying in numbers of acres, and several of them including lead-mines; no survey of any land was made under the grant, until after the treaty of cession. By the decree of the district court, the claim was rejected, and that decree was affirmed by the supreme court.

It was never doubted by this court, that property of every description in Louisiana was protected by the law of nations, the terms of the treaty, and the acts of congress; nor that, in the term "property, was comprehended every species of title, inchoate or perfect; embracing those rights which lie in contract; those which are executory, as well as those which are executed; in this respect, the relation of the inhabitants to their government is not changed; the new government takes the place of that which was passed away." (4 Pet. 512.)

The act of congress of 1804, which submitted claims to land in Louisiana to judicial cognisance, confined the court to such claims as had been legally made, granted or issued, before the 10th of March 1804, which were protected by the treaty of 1803, and might have been perfected

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into a complete title under the laws, usages and customs of Spain, if she had continued to hold the government of the province.

It was also made the duty of the court, to conduct the proceedings on all petitions, according to the rules of a court of equity, and to decide upon them according to the principles of justice, and the laws and ordinances of the government under which the claim originated. In thus consenting to be made defendants in equity, at the suit of every claimant for land in Missouri, the United States waived all rights which the treaty could give them, as purchasers for a valuable consideration, without notice; they bound themselves to carry into specific execution by patent, every grant, concession, warrant or order of survey which, before the 10th of March 1804, had created any legal or equitable right of property in the land so claimed; so that in every case arising under the law, one general question was presented for the consideration of the court—whether, in the given case, a court of equity could, according to its rules and the laws of Spain, consider the conscience of the king to be so affected, by his own, or the acts of the lawful authorities of the province, that he had become a trustee for the claimant, and held the land claimed, by an equity upon it, amounting to a severance of so much from his domain, before the 10th of March 1804, in Missouri, and the 24th of January 1818, in Florida, the period fixed by the law, in the one case, and the treaty, in the other?

The principles which have been established by the decisions of the court, in relation to claims to lands under grants from the crown of Spain, or the officers of Spain authorized to make grants. No claim to land in Missouri can be confirmed, under the acts of 1824 or 1828, unless by a grant, concession, warrant or order of survey, for some tract of land described therein, to make it capable of some definite location, consistently with its terms, made, granted or issued before the 10th of March 1804, or by an order to survey ^{*any given quantity, without any de-}
scription or limitation as to place, which shall have been located by a survey, made by a proper officer, before that time.^{*}

Congress did not contemplate the submission of any claims to the court, except such as, on confirmation, could be surveyed and patented, and on rejection, would be thenceforth held and taken to be a part of the public lands; though cases of claims to make a prospective severance of particular tracts from the general domain, when the grant was wholly indefinite, would require a distinct provision. Spain never permitted individuals to locate their grants by mere private survey; the grants were an authority to the public surveyor, or his deputy, to make the survey, as a public trust, to protect the royal domain from being cut up at the pleasure of the grantees; a grant might be directed to a private person, or a separate official order given to make the survey; but without either, it would not be a legal execution of the power.

The laws of the United States give no authority to an individual to survey his grant or claim to lands; he may mark lines to designate the extent and bounds of his claim, but he can acquire no rights thereby; neither in this, nor the record of any of the cases which have been before this court, has it seen any evidence of any law of Spain, local regulations, law or usage, which makes a private survey operate to sever any land from the royal domain; on the contrary, all the surveys which have been exhibited in the cases decided, were made by the surveyor-general of the province, or his deputies, by the special order of the governor or intendant, or those who represented them. No government gives any validity to private surveys of its warrants or orders of survey, and there is no reason to think, that Spain was a solitary exception, even as to the general domain, by grants in the ordinary mode, for a specific quantity, to be located in one place.

It is for another branch of the government to decide on the claims of the petitioner, under the third section of the act of 1828; with that, this court have nothing to do; its duty terminates by a decision on the validity of his title, by any law, treaty or proceedings under them, according to those principles of justice which govern courts of equity.

APPEAL from the District Court of Missouri.

This case was argued, at January term 1830, by *Benton*, for the appellant; and by *Wirt*, for the United States; the court held it under advisement, for the reasons stated in the case of *John Smith, T. v. United States*, 4 Pet. 511. The case is fully stated in the opinion of this court.

¹ *United States v. Boisdoré*, 11 How. 63.

² *Dauterive v. United States*, 101 U. S. 700.

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BALDWIN, Justice, delivered the opinion of the court.—Pursuant to the provisions of the act of 1824, for the adjustment of land-claims in the state of Missouri, John Smith, T., filed his petition in the district court, on the 3d of October 1827, claiming a confirmation of his title to 10,000 arpents of land, in that state, in virtue of a Spanish concession to James St. Vrain, a resident of *Louisiana, legally made, before the 10th of March [*_328 1804, by the proper authorities. He alleged, that his claim was protected by the treaty between France and the United States for the cession of Louisiana; and might have been perfected into a complete title, under the laws, usages and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States.

His claim is founded on a petition of James St. Vrain to the governor-general of Louisiana, in November 1795, praying for a grant in full property, to him and his heirs, of 10,000 superficial arpents of land; with the special permission to locate in separate pieces, upon different mines, of what nature they may be, salines, mill-seats, and any other place that shall appear suitable to his interest, without obliging him to make a settlement; which grant, as prayed for, was granted by the said governor-general, the 10th of February 1796. He alleges, that he became owner of the grant, by purchase from St. Vrain and wife, before the act of 1824, and has caused several parts thereof to be located in Missouri, which he specifies in the petition; and prays that the validity of his claim may be examined by the court. On the face of the petition, the petitioner shows a case within the provisions of the first section of the law of 1824, which directs the court to take jurisdiction to hear and determine it.

The petition of St. Vrain to the governor-general of Louisiana, states, that misfortunes had induced him to settle in Louisiana, at St. Genevieve, where he had rendered himself useful in repressing a certain party; that his knowledge of mineralogy had induced his father to make over to him the contract which he had with the government for the supply of a certain quantity of lead. To enable him to comply with this contract, and to insure him an honorable existence, he prays for a grant, as specified in the petition of the appellant. At the foot of this petition there was the following writing. “New Orleans, 10th of February 1796. Granted. THE BARON DE CARONDELET.”

The original petition, with this entry upon it, was produced before the land commissioners in Missouri, in 1806; the signature of the baron was proved to be in his handwriting, and the residue to be that of the secretary of the government. The original was lost, in 1807 or 1808, but a copy, certified from the land records, was produced at the hearing in the court below, and competent evidence *was given of the existence and loss of the original; the district court did not, in their decree, decide on the effect [*_329 of this evidence, nor do we think it necessary to consider it; for the purposes of this case, the genuineness of the grant, and its loss, are assumed. On the 6th of February 1808, St. Vrain and wife, in consideration of \$5000, conveyed the concession to the petitioner, by deed duly recorded.

In 1811, the petitioner caused a survey of 294 arpents of land to be made by a private surveyor, pursuant to the concession to St. Vrain; other surveys were afterwards made, in like manner, of several tracts specified in the

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record, varying in quantity from 1200 to 50 arpents, several of them including lead-mines ; the one for 50 acres being on a mill-seat. The claim was acted on by the United States board of land-commissioners in Missouri ; who, in December 1811, gave their opinion, that it ought not to be confirmed. The district court of Missouri have also rejected it by their final decree ; from which the petitioner has taken an appeal to this court, in the manner directed by the act of 1824.

At the January term in 1830, this cause, with that of Soulard, was very ably and elaborately argued by the counsel on both sides ; they were the first cases which came before us, since the law giving jurisdiction to the district court of Missouri to decide on claims to land in that state, subject to an appeal to this court. The subject was a new one, both to the court and the bar ; the titles and tenures of land in Louisiana had never undergone a judicial investigation, which could give the court such information as could lead them to any satisfactory conclusion. Hence, and notwithstanding the full argument in these cases, there seemed to be much matter for consideration, in the developments to be made of the laws, usages and customs of Spain, in relation to grants of land in Louisiana. These cases were held under advisement. At the next term, finding that appeals had been made in cases from Florida, arising under a law authorizing a judicial decision on claims to land in that territory, on the consideration of which the whole subject of Spanish titles would be thoroughly examined, these causes were further postponed till the ensuing term. One of the Florida cases was then decided, on principles which did not apply to them ; and it was thought, that still further information must be presented in some of the numerous cases before us for final adjudication, *and a further postponement was, therefore, deemed advisable. At each successive term since, it has been our duty to decide on claims to land under the government of Spain, if not in all the aspects in which they can be presented, at least, in those sufficiently varied as to enable us to decide this case on principles entirely satisfactory to ourselves.

It was never doubted by this court, that property of every description in Louisiana was protected by the law of nations, the terms of the treaty, and the acts of congress ; nor that in the term "*property*, was comprehended every species of title, inchoate or perfect, embracing those rights which lie in contract ; those which are executory, as well as those which are executed. In this respect, the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away." 4 Pet. 512. Such, in 1830, was our general view of the Missouri cases. Our difficulty was, in ascertaining the powers of the governor-general, of the intendant and his sub-delegates, and the local governors or commandants of posts, to make grants of lands ; what acts by either operated by way of grant, concession, warrant or order of survey ; so as to sever any portion of land from the royal domain, and create in it a right of property in an individual. The law submitting claims of either of these four descriptions to judicial cognisance, confined the court to such as had been legally made, granted or issued, before the 10th of March 1804, which were protected by the treaty of 1803, and might have been perfected into a complete title, under the laws, usages and customs of Spain, if she had continued to hold the government of the province. It was also made the duty of the court, to con-

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duct the proceedings on all petitions, according to the rules of a court of equity ; and to decide upon them, according to the principles of justice, and the laws and ordinances of the government under which the claim originated. In thus consenting to be made defendants in equity, at the suit of every claimant for land in Missouri, the United States waived all rights which the treaty could give them, as purchasers for a valuable consideration, without notice. They bound themselves to carry into specific execution by patent, every grant, concession, warrant or order of survey which, before the 4th of March 1804, had created any legal or equitable right of property in the land so claimed ; so that in every case arising under the law, one general question was presented for the consideration of the court—Whether, in the given *case, a court of equity could, according to its rules and the laws of Spain, consider the conscience of the king to be so affected, [*331] by his own, or the acts of the lawful authorities of the province, that he had become a trustee for the claimant, and held the land claimed, by an equity upon it, amounting to a severance of so much from his domain, before the 10th of March 1804, in Missouri, and the 24th of January 1818, in Florida ; the periods fixed by the law in the one case, and the treaty, in the other ?

In all other adjudications, on either class of cases, we have considered the term *lawful authorities*, to refer to the local governors, intendants or their deputies ; the *laws and ordinances* of Spain, as composed of royal orders, of those of the local authorities, and the usage and custom of the provinces, respectively, under Spain ; that any inchoate or perfect title, so made, granted or issued, is *legally* made by the proper authorities. We have as uniformly held, that in ascertaining what titles would have been perfect, if no cession had been made to the United States, we must refer to the general course of the law of Spain, to local usage and custom ; and not to what might have been, or would have been, done by the special favor, or arbitrary power of the king or his officers. It has also been distinctly decided, in the Florida cases, that the land claimed must have been severed from the general domain of the king, by some grant which gave it locality, by its terms, by a reference to some description, or by a vague general grant, with an authority to locate afterwards by survey, making it definite ; which grant or authority to locate must have been made before the 24th of January 1818. That where the grant is descriptive, a survey in any other place is unauthorized ; and that where a survey was made of part of a descriptive grant, before that time, an order or permission to survey the residue elsewhere, made afterwards, is void, as in contravention of the terms of the treaty and the act of congress ; it being in effect and substance a new grant, made after the power of the governor to make grants had ceased. That where the grant was specific, a survey might be made, after the time fixed by the treaty ; and where the grant was vague, or contained an authority to locate, which was executed by a survey made before, it was valid. *United States v. Clarke*, 8 Pet. 466-7.

The same principles apply to the cases in Missouri ; between which and those from Florida, there is (generally speaking) no other *difference than that, as to the latter, the treaty annuls all claims acquired after [*332] the 24th of January 1818 ; while the act of 1824 limits the jurisdiction of the court to cases of claims made in virtue of grants, &c., made before the 10th of March 1804. This limitation on the power of the court as effectually prohibits their confirmation of grants, &c., subsequently made or

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titles acquired, as if they had been declared void by the terms of the law, or the Louisiana treaty.

In his petition to the governor-general, St. Vrain asks for a grant in full property, of 10,000 arpents, to be located at his pleasure as to place, time or quantity; it was considered by him, as authorizing locations throughout Louisiana, not only while under the government of Spain, but after its cession to the United States, and its division into the two territories of Orleans and Missouri. So it was considered by the petitioner Smith, after he purchased from and held under St. Vrain; and such appears to be the true construction of the petition. The grant is contained in the one word *granted*, which must be referred to everything prayed for in the petition; its object was, not to obtain a grant merely in the upper province, or it would have been addressed to the local governor; it must have been intended to extend to both provinces, as it was addressed to the governor-general, whose power was general over both. He, by his grant, without qualification or restriction, has acted in the plenitude of his authority, which authorizes no construction that could limit it to the upper province, more than to the lower; a limitation to either would be by an arbitrary decision, without rule; so would any construction cutting down the concession, by striking from it any right or privilege prayed for. This, then, was the nature and effect of the grant, to vest in the petitioner a title in full property to all the lands, in either province, containing saline, mineral, or where there were mill-seats; which he might at any time locate, in quantities to suit his own pleasure, or at any other place that might suit his interest.

When the cession of Louisiana was completed by the surrender to the United States, the title of St. Vrain remained precisely as it was at the date of the grant in 1796; there is no evidence, that he had done, or offered to do, any act or made any claim or demand, asserting or affirming any right under the grant. With all the ungranted salt-springs, lead-mines, mill-seats and valuable spots in Louisiana at his command, he held his grant dormant in his pocket, for eight *years, under the Spanish government, without making, or attempting to make, one location under it. On the 4th of March 1804, then, no land had been granted to St. Vrain; there was not an arpent on which his right had any local habitation; until a location was made, it was a mere authority to locate, which he might have exercised at his pleasure, both as to time and place, by the agency of a public surveyor, authorized to separate lands from the royal domain by a survey, pursuant to a grant, warrant or order of survey. At the time of the cession, nothing had been so severed, either by a public or private surveyor, or any act done, by which the king could be in any way considered as a trustee for St. Vrain for any portion of the 10,000 arpents; and there was no spot in the whole ceded territory in which he had, or could claim an existing right of property. An indispensable pre-requisite to such a right was by some act by which his grant would acquire such locality as to attach to some spot; until this was done, the grant could, by no possibility, have been perfected into a complete title.

It is clear, therefore, that the integrity of the public domain had in no way been affected by this grant, in March 1804. The only pretence of any

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right was one which extended to every vacant spot in Louisiana, to be located in future, at the option of the grantee ; it so continued till 1811, when the first location was made by the petitioner Smith, by a private survey, on part of the lands he claims. It is evident, that he had no other right to this tract of land, in March 1804, than he had to all the vacant lands in Louisiana. Had his claim been presented to the district court, while it remained thus indefinite, and incapable of definition, there would have been no case for its jurisdiction, under the act of 1824, to confirm or reject the claim. The sixth section provides, that on the confirmation of any claim, the surveyor should cause the land specified in the decree to be surveyed, a plot thereof to be made, delivered to the party, and a patent to issue therefor ; if rejected, the seventh section directs, "the land specified in such claim shall forthwith be held and taken as a part of the public lands of the United States." By the eleventh section, if the lands decreed to any claimant have been sold or disposed of by the United States, or have not been located, the party interested may, after the land has been offered at public sale, enter the like quantity of land in any land-office of the state. These provisions show clearly, that congress did not contemplate the submission of any claims to the court, except such as, on confirmation, could be *surveyed and patented, and on rejection, would be thenceforth held and taken to be a part of the public lands ; though cases of [*384 claims, to make a prospective severance of particular tracts from the general domain, when the grant was wholly indefinite, would require a distinct provision. If confirmed, no land could be specified in the decree, none could be surveyed ; nor could lands which never had been the subject of specific claim, described in no grant or survey, become a part of the public lands, within the meaning of the law, after the decree, if there had not been some assertion by the claimant of their having been once his property, by a severance by grant. In providing for a case where the land had not been located, it was the evident intention to refer to grants of land, by some description, before the 10th of March 1804, which had not been surveyed ; it is certain, that it could not apply to this.

Should this grant be confirmed, it must follow its tenor and purport ; the decree must affirm its validity, not merely to the quantity of land, but with the right of location according to its express terms, which gives St. Vrain the unlimited choice of the most valuable portions of the public lands. It would be in direct violation of those rights which constitute the great value of the claim, which were not the quantity of land granted, but the unlimited power of selection, to make a decree that they were secured to him by the law of nations, the treaty and acts of congress, as inviolable, and in the same degree to limit him to the selection of such lands in Missouri as should have been offered at public sale, without any bid beyond the minimum price of the public lands. This would necessarily deprive him of the very spots to which he would be entitled under our decree, whenever he might choose to appropriate them by a lawful survey.

We are, therefore, clearly of opinion, that no claim to land in Missouri can be confirmed, under the acts of 1824 or 1828, unless by a grant, concession, warrant or order of survey for some tract of land therein described, to make it capable of some definite location, consistently with its terms, made, granted or issued before the 10th of March 1804, or by an order to

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survey any given quantity, without any description or limitation as to place, which shall have been located by a survey, made by a proper officer before that time, as was *Soulard's* case. Spain never permitted individuals to locate their grants, by mere private survey. The grants were an authority to the public surveyor or his deputy to make the survey as a public trust, to protect the public domain from being cut up at the pleasure *335] *of the grantees. A grant might be directed to a private person, or a separate official order given to make the survey; but without either, it would not be a legal execution of the power. No such survey was made on this grant, so that it had not attached to the land claimed, at the time named in the law.

We have then to inquire, whether a private survey, made in 1811, could be so connected with the grant of 1796, as to operate, by relation, to make out a title to the land claimed in March 1804. The laws of the United States give no authority to an individual to survey his grant or claim to lands; he may mark lines, to designate the extent and bounds of his claim, but he can acquire no rights thereby. The only effect which we can give to this private survey, is to consider it as a selection by the petitioner of that piece of land, as a part of what he was entitled to locate in virtue of his general grant. As the United States have put themselves in the place of Spain, we must view this selection, thus made, as if Louisiana had never been ceded to him. But neither in this, nor the record of any of the cases which have been before us, have we seen any evidence of any law of Spain, local regulation, law or usage, which makes a private survey operate to sever any land from the royal domain. On the contrary, all the surveys which have been exhibited, in the cases decided, were made by the surveyor-general of the province, or his deputies, the special order of the governor or intendant, or those who represented them. No government gives any validity to private surveys of its warrants or orders of survey; and we have no reason to think, that Spain was a solitary exception, even as to the general domain, by grants in the ordinary mode, for a specific quantity, to be located in one place; *a fortiori*, where a grant, *sui generis*, might, by its terms, be so split up as to cover every saline, mineral, and water-power site, in the whole territory. Of all others, the survey of such a grant ought to be made by an authorized officer. If the grant was a lawful authority for such selections, its execution by survey ought to be so supervised, that the selections should be made in a reasonable time, quantity of land and spots selected.

We cannot believe, that Spain would have ever consented to the exercise of such a right, by an individual, over all the most valuable portions of her domain, when she did not permit the appropriation of her ordinary lands to be so made; still less, that a claim of this description would have been perfected into a complete title, had she remained in possession of Louisiana, or *336] that it ought so to have been. *The claim was unreasonable in its nature, excluding the government from all control over locations made on a sweeping grant; which, by small subdivisions, might be a monopoly of every valuable spot in both provinces. Such a grant, with such privileges, has no equity in it, as against the government of Spain, or the United States standing in their place. There appears no law, usage or custom to authorize it; and it is incompatible with those rights which every government reserves

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to itself, of directing by its own officers, the surveys of its lands, either on specific grants, or orders of survey for vacant lands.

The negative evidence in the record is also powerful to lead to the same conclusion. The unprecedented privilege granted to St. Vrain was of immense value, if asserted in time, before other appropriations were made of the places of which he had the right of selection, without limit ; but it would become less valuable, by waiting till others had obtained grants for them. Neither he, nor the petitioner Smith, have in any way accounted for the delay. They have shown no selection made, no application to a public or even private surveyor, to make any survey, during the eight years which elapsed, from the date of the grant till the cession. The grant does not appear to have been recorded or entered in any Spanish office, exhibited to any Spanish officer, or any notoriety given to it, by any assertion of right under it. With such powerful reasons for action, it is not a harsh construction of this conduct of St. Vrain, to attribute it to the conviction, that the Spanish authorities would not have sanctioned his claim. The power of the governor-general being supreme, his power would not have been invoked in vain, if the grant was good ; and no officer in the province would have disobeyed his order to survey, on the selections being made.

It is not for us to say what, if any, acts would have given St. Vrain an equity in any definite piece of ground ; it suffices for this case, that he had none, while the country was under the government of Spain, and that the petitioner Smith has acquired none, since the cession, by any acts which he has done, or caused to be done, in making the location specified in his petition.

It is for another branch of the government to decide on the claims of the petitioner, under the third section of the act of 1828. With that we have nothing to do ; our duty terminates by a decision on the validity of his title by any law, treaty or proceedings under them, according to those principles of justice which govern courts of equity. Being clearly of opinion, that the claim of the petitioner to any of the *land claimed by his petition is not valid, and ought not to be confirmed, the decree of the district [*337 court is affirmed.

THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the district of Missouri, and was argued by counsel : On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said district court in this cause be and the same is hereby affirmed.

*JOSEPH A. WHERRY and others, Heirs of MACKEY WHERRY, [*338 deceased, Appellants, v. UNITED STATES, Appellees.

Missouri land-claims.

On the 18th of April 1802, the lieutenant-governor of Upper Louisiana granted 1600 arpents of land, near certain rivers named in the grant, with directions to survey the same in a vacant place of the royal domain ; but no survey was made, before the cession of Louisiana to the United States. As the grant contained no description of the land granted, and was not located within the time prescribed by the act of congress of the 10th of March 1804, it comes directly within the point decided by this court in the case of John Smith, T., and cannot be confirmed

Mackay v. United States.

APPEAL from the District Court of Missouri. The case is fully stated in the opinion of the court.

It was argued by *White*, for the appellants; and by *Butler*, Attorney-General, for the United States.

BALDWIN, Justice, delivered the opinion of the court.—This is an appeal from the decree of the district court of Missouri, rejecting the claim of the appellants to 1600 arpents of land in that state, for the confirmation of which they had filed their petition, pursuant to the provisions of the act of 1824, for the adjustment of land-claims in that state. The petition was in the form prescribed by law, presenting a proper case for the jurisdiction of the court.

The claim of the petitioner was founded on an application by *Mackey Wherry* to the lieutenant-governor of Upper Louisiana, on the 15th of April 1802, for a grant of 1600 arpents of land, near the rivers Dardennes and Mississippi, in the vacant lands of the king, which he shall point out at the time of the survey. On the 18th of the same month, this application was granted by the lieutenant-governor, with directions to survey the quantity demanded, in a vacant place of the royal domain; but no survey appears to have been made, before the 10th of March 1804. As this grant contained no description of the lands granted, and was not located, before *339] the time prescribed by the act of 1824, [submitting these cases to judicial cognisance, it comes directly within the point decided by this court in the case of *John Smith, T. v. United States*, at this term, and cannot be confirmed. It is, therefore, our opinion, that the title of the petitioners to the land claimed and described in their petition, is not valid. The decree of the district court is affirmed.

THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the district of Missouri, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said district court in this cause be and the same is hereby affirmed.

*340] ***ISABELLA MACKEY, Widow, JOHN ZENON MACKEY and others, Heirs of JAMES MACKEY, Appellants, v. UNITED STATES.**

Missouri land-claims.

A grant of land in Missouri, made by a lieutenant-governor of Upper Louisiana, before the treaty of 1804, affirmed.

In repeated decisions, the supreme court have affirmed the authority of local governors, under the crown of Spain, to grant land in Louisiana, before the same was ceded by Spain, to France, and the court have also affirmed the validity of descriptive grants, though not surveyed before the 11th of March 1804, in Missouri, and the 24th of January 1818, in Florida.

APPEAL from the District Court of Missouri. The case is stated in the opinion of the court.

It was argued by *White*, for the appellants; and by *Butler*, Attorney-General, for the United States.

Mackey v. United States.

BALDWIN, Justice, delivered the opinion of the court.—This is an appeal from the decree of the district court of Missouri, rejecting the claim of the appellants to 800 arpents of land in that state; for the confirmation of which they had filed their petition, pursuant to the provisions of the act of 1824, for the adjustment of land-claims in that state. The petition was in the form prescribed by the law, presenting a proper case for the jurisdiction of the court.

The claim of the petitioners was founded on an application by James Mackey, to the lieutenant-governor of Upper Louisiana, on the 13th of September 1799, for a grant of 800 arpents of land, at a place therein particularly described. On the 14th of the same month, the application was granted by the lieutenant-governor, with directions to make the survey, and put the party into possession. The grant or commission was proved to have been in the handwriting of the surveyor-general; the signature of the lieutenant-governor was also proved to be genuine. The claim of the petitioner was rejected by the district court, on the ground, that the grant was not consistent with the regulations of O'Reilly, made in 1770, and was invalid for the want of authority to make it.

*Having heretofore decided, that these regulations were not in force in Upper Louisiana, this court cannot consider them as in any way affecting the title of the petitioners. In repeated decisions, we have affirmed the authority of the local governor to make grants of land, and have also affirmed the validity of descriptive grants; though not surveyed before the 10th of March 1804, in Missouri, and the 24th of January 1818, in Florida.

But there is another objection to the title of the claimants, which is suggested in the decree of the court below, though it is not assigned as a reason for its rejection. In the original petition to the lieutenant-governor, the land prayed for is described as adjoining the land of Mr. Choteau; whereas, the grant to Choteau for the land referred to, was not made until January 1800, four months after the date of Mackey's application, in September 1799. This was deemed a circumstance tending to show that his grant was fraudulently ante-dated; and had it not been explained, would have induced this court to have directed an issue to the court below to try its genuineness.

By the record in the case of *Choteau's Heirs*, decided at the last term (9 Pet. 142-3), it appears, that, by a letter of the 20th of May 1799, the governor-general of Louisiana directed the governor of the Upper province to favor all the undertakings of Mr. Choteau. In the evidence given in that case, it was established, that Mr. Choteau had erected a distillery on the tract granted to him in 1800, as early as 1796, which was occupied and in operation, from that time until the date of the grant; after obtaining which, he enlarged and continued the establishment at the same place. It is, therefore, perfectly consistent with the date of Mackey's application, that he should refer to land in the occupation and actual possession of Choteau; though he had not, at the time, any grant or order of survey. The record in the present case also shows, that the court below have considered this subject, and did not think the reference to Choteau's land was such evidence of fraud or of ante-dating the grant, as to make it their duty to prevent it from being used as evidence of title to the land claimed. The final decree

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was rendered on the 15th of January 1830. On the 16th, the court ordered that the clerk retain, with the papers on file in this case, the concession upon which the claim is founded, until its further order. On the 18th the court "ordered that the petitioners show cause why the concession *342] under which the petitioners claim *should not be impounded by the court." This rule was discharged on the 5th of February 1830.

After such evidence as appears on the record in the case of *Choteau*, and the proceedings of the district court in this case in relation to the grant to the petitioner, it is fair to presume, that the court was satisfied, on their last examination, that the grant to Mackey was genuine, and not open to any impeachment on account of the reference to Choteau's adjoining land. It would be assuming much, in this case, for this court to decide, as a matter of fact, that the grant was fraudulent and void; the proof of the signature to, and the handwriting of, the grant, is positive and uncontradicted; and the reference to Choteau's land, before the date of the grant to him, is accounted for. We, therefore, are of opinion, that the grant was genuine, and that the title of the petitioners derived therefrom is valid, by the law of nations, of the United States, of Spain, under whose government the claim originated, and by the stipulations of the treaty ceding Louisiana to the United States; and ought to be confirmed.

It is therefore ordered, adjudged and decreed by this court, that the decree of the district court be and the same is hereby reversed; and proceeding to render such decree as the said district court ought to have rendered, it is further ordered, adjudged and decreed, that the title of the petitioners to the land described in their petition to the district court, is valid by the laws and treaty aforesaid, and the same is hereby confirmed as therein described; and that the surveyor of public lands in Missouri be and he is hereby directed to survey the quantity of land claimed in the place described in the petition and grant, or concession; that he deliver to the petitioners a copy or plat of such survey, and also do and perform such other acts and things therein as by law are directed.

*343] *UNITED STATES, Plaintiffs in error, v. PHINEAS BRADLEY, surviving Administrator of DAVID OTT, deceased.

Bonds of public officers.

An action was instituted on a joint and several bond given by H., O. and V., to the United States of North America; which, after reciting that H. had been appointed paymaster of the rifle regiment of the army of the United States, conditioned, that if H. shall "well and truly execute, and faithfully discharge, according to law, and to instructions received by him from proper authority, his duties, as paymaster aforesaid; and he, his heirs, executors or administrators shall regularly account, when thereto required, for all moneys received by him, from time to time, as paymaster aforesaid, with such person or persons as shall be duly authorized and qualified on the part of the United States for that purpose; and moreover, pay into their treasury such balance as, on a final settlement of the said John Hall's accounts, shall be found justly due from him to the said United States, then the obligation should be null and void, and of no effect, otherwise to be and remain in full force and virtue.

The act of congress of the 24th of April 1816, provides, "that all officers of the pay, commissary and quartermaster's department shall, previous to entering on the duties of their respective offices, give good and sufficient bonds to the United States, fully to account for all moneys and public property which they may receive, in such sums as the secretary of war shall direct."

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H. became largely indebted to the United States for money advanced to him as paymaster, and suit was brought against the administrators of O., one of his sureties. The bond not having been, in its very terms, in conformity with the provisions of the law, the sureties claimed that they were not bound by it, because of this variance; and because the United States had no right to take any other bond but that prescribed by the statute.

So far as the condition of the bond required the paymaster to account for moneys received by him, it substantially follows the provisions of the law; and if the bond be not clearly void, from its not being in all respects in conformity with the law, the United States are entitled to recover.

This case differs from that of the United States *v.* Tingey, 5 Pet. 115, as there was in that case an averment, not denied, that the bond was obtained from the obligors, by extortion and oppression, under color of office. This must be taken to be a bond voluntarily given by the paymaster and his sureties, for a lawful purpose, and for the faithful performance of the duties of paymaster.

No rule in pleading is better settled, or upon sounder principles, than that every plea in discharge or avoidance of a bond, should state positively and in direct terms, the matter in discharge or avoidance; it is not to be inferred, *arguendo*, or upon conjecture.

In the case of the United States *v.* Tingey, 5 Pet. 115, it was held, that the United States being a body politic, as an incident to their general right of sovereignty, have a capacity to enter into contracts, and take bonds, in cases within the sphere of their constitutional powers, and appropriate to the just exercise of those powers, through the instrumentality of the proper department to which those powers are "confided, whenever such contracts or bonds are not prohibited by law; although the making of such contracts, or taking such bonds, may [*844] not have been prescribed by any pre-existing legislative act. From the doctrine here stated, the court have not the slightest inclination to depart; on the contrary, from further reflection, they are satisfied, that it is founded upon the soundest principle of law, and the just interpretation of the constitution.¹

That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded in illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognised from a very early period; the doctrine has been maintained, and is settled law, at the present day, in all cases, where the different covenants or conditions are severable, and independent of each other, and do not import *malum in se*.

There is no solid distinction, in cases like the one before the court, between bonds and other deeds containing conditions, covenants or grants, not *malum in se*, but illegal at the common law; and those containing conditions, covenants or grants illegal by the express prohibition of statutes; in each case, the bonds, or other deeds are void, as to such conditions, covenants or grants which are illegal, and are good as to all others which are legal and unexceptionable in their purport. The only exception is, when the statute has not confined its prohibition to the illegal conditions, covenants or grants, but has, expressly, or by necessary implication, avoided the whole instrument, to all intents and purposes.²

The act of congress of 1816 nowhere declared, that all other bonds, not taken in the prescribed form, shall be utterly void; nor does such an implication arise from any of the terms contained in the act, or from any principles of public policy which it is designed to promote. A bond may, by mutual mistake or accident, and wholly without design, be taken in a form not prescribed by the act; it would be a very mischievous interpretation of the act, to suppose, that under such circumstances, it was the intention of the act, that the bond should be utterly void; nothing but very strong and express language should induce a court of justice to adopt such an interpretation. Where the act speaks out, it would be our duty to follow it; where it is silent, it is a sufficient compliance with the policy of the act, to declare the bond void as to any conditions which are imposed upon a party, beyond what the law requires; this is not only the dictate of the common law, but of common sense.

The appointment of a paymaster is complete, when made by the president and confirmed by the senate; the giving a bond for the faithful performances of his duties, is a mere ministerial act, for the security of the government; and not a condition precedent to his authority to act as a paymaster.

The misdescription of the corporate or politic name of the plaintiffs in the bond, by calling

¹ United States *v.* Linn, 15 Pet. 290; United States *v.* Hodson, 10 Wall. 395.

² United States *v.* Mora, 97 U. S. 413

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them "The United States of North America," instead of America, is secured by the averment of identity in the declaration.

ERROR to the Circuit Court of the District of Columbia, and county of Washington. The United States, in August 1825, instituted an action of debt, in the circuit court, against Phineas Bradley and Andrew Way, administrators of David Ott, upon a joint and several bond to the United States of North America, executed by John Hall, David Ott and Nicholas Vanzandt, on the 28th day of May 1819.

The condition of the bond was, "that whereas, the above-bounden John Hall is *appointed paymaster of the rifle regiment, in the army of the *345] United States aforesaid ; now, if the said John Hall shall well and truly execute, and faithfully discharge, according to law, and to instructions received by him from proper authority, his duties, as paymaster aforesaid, and he, his heirs, executors or administrators, shall regularly account, when thereto required, for all moneys received by him, from time to time, as paymaster aforesaid, with such person or persons as shall be duly authorized and qualified on the part of the United States for that purpose ; and moreover, pay into their treasury, such balance as, on a final settlement of the said John Hall's accounts, shall be found justly due from him to the said United States, then this obligation shall be null, void and of no effect : otherwise, to be and remain in full force and virtue."

To the declaration, the defendants pleaded six several pleas, and issues were joined on the second, fourth and sixth. The third plea alleged, that the defendants ought not to be charged with the debt, by virtue of the supposed writing obligatory, because John Hall was appointed paymaster long after the 24th of April 1816, and after the passing of the act of congress, entitled "an act for organizing the general staff, and making further provision, for the army of the United States ;" and that this was the only law authorizing or requiring a bond to be given by him to the United States, as paymaster or otherwise, or authorizing any person to take such a bond ; and that the said John Hall, as such paymaster, did not, after being appointed paymaster, or at any time, give any bond whatsoever, to account for all moneys and public property which he might receive, in such sums, as the secretary of war should direct, or otherwise, in pursuance and execution of the said act of congress ; and that the said John Hall had not, at any time after he was appointed such paymaster as aforesaid, any right, title or authority whatsoever, as such paymaster, or in virtue of such his appointment, or otherwise howsoever, to receive any money or property of the United States, or any public money or public property whatsoever, to be accounted for in pursuance and execution of the said act of congress, or otherwise, to the said United States, or to the government, or any officer of the government of the said United States, or to any other person or persons whatsoever, in the name, or for, or in behalf of the said United States ; nor in any manner to enter on the duties of his said office or appointment of paymaster, or to do, perform or execute the duties, or any of the duties of the same.

*To this plea, the United States replied, that by an act of congress, *346] entitled "an act for organizing the general staff, and making further provision for the army of the United States," passed on the 24th of April 1816, it was, among other things, enacted, that all officers of the pay, com-

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missary and quartermaster's department, should, previous to their entering on the duties of their respective offices, give good and sufficient bonds to the United States, fully to account for all moneys and public property which they might receive, in such sums as the secretary of war might direct ; and that after the passage of the said law, and while the same was in full force and effect, on the 26th of May 1818, the said John Hall was duly appointed paymaster in the rifle regiment, in the army of the United States, and in consequence of his appointment as paymaster aforesaid, and with the intent of complying with the act of congress aforesaid, and by the direction of the secretary of war of the United States, he the said John Hall, with David Ott, now deceased, and the said Nicholas B. Vanzandt, did execute and deliver, in due form of law, the said writing obligatory in the said defendant's plea mentioned ; and the same was then and there accepted by the said United States ; and the said John Hall, after the same was so accepted as aforesaid, and under and by virtue of his appointment as aforesaid, did enter upon the performance of the duties of paymaster as aforesaid, and did, from time to time, receive from the United States, as such paymaster as aforesaid, sundry large sums of money, amounting altogether to more than _____ dollars, to be accounted for by him as such paymaster as aforesaid ; and the said United States say, that of the moneys so received by him the said John Hall, of the United States as aforesaid, the sum of _____ dollars was altogether unaccounted for by him, the said John Hall ; and that upon a final settlement of the accounts of him, the said John Hall, as paymaster aforesaid, by the proper officers of the government of the United States, there was found to be due from the said John Hall to the United States, on account of moneys received by him of the United States as paymaster aforesaid, the sum of _____ dollars, which said sum the said John Hall, in his lifetime, and the said defendants, since his death, altogether failed to pay to the said United States.

The defendants demurred to this replication, and assigned for causes of demurrer :

1. That the bond, with the conditions thereof, was not taken in pursuance of the directions, nor under the authority of the act ; but [*347 was essentially different in its purport and effect from the same.

2. That in the replication, the plaintiffs have not averred nor shown any authority for taking the bond, with the condition, nor for the delivery and acceptance of the same ; but they have shown the same was not taken and delivered, and accepted as such bond.

3. That the bond, as described and set forth in the declaration, varies from the supposed writing obligatory, in this, that it purports to be an obligation to the United States, without ascertaining what United States ; and further purports to be the simple obligation of the said David Ott, to pay the United States the sum of \$20,000 : whereas, the supposed writing obligatory purports to be an obligation to some states, described as the United States of North America ; and further purports to be an official bond to the last-named states, executed by one John Hall, the said David Ott and one N. B. Vanzandt, the last two, as sureties for said Hall's performance of certain official duties to the last-named states, as set forth in said condition ; and further purports to be a bond which the government of the United States of America, or any officer or agent of said government,

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had no power or authority to take or accept in behalf of the last-named United States.

4. That it does not appear in the replication, that the bond had been delivered by the obligors, or any of them, or accepted or received by any person on behalf of the last-named United States, by any lawful authority, but the contrary appears.

5. That is does not appear from the replication, that John Hall had, at any time after his said supposed appointment to the office of paymaster, any right, title or authority to enter on the duties of the said office, or to receive, in virtue of such appointment, any money or property of the said United States, or any public property or public money whatever ; to be accounted for to the said United States, or to the government, or any officer or agent thereof, or otherwise to perform and execute the duties, or any of the duties of such office ; nor that he had lawfully and officially received any such property or money, and failed to account for the same, or otherwise broken the said condition ; but the contrary appears.

6. That the bond and condition are illegal and defective in form and substance, and altogether void and contrary to law.

The fifth plea set forth that the defendants ought not to be charged, because John Hall was appointed a paymaster, a long time *after [348] the act of congress of the 24th of April 1816, entitled "an act for organizing the general staff," &c., and that at the time of his appointment, that act was and yet is in force, and was and yet is the sole and only law, rule and regulation, or authority, under which any bonds to be given by John Hall to the United States, as paymaster, or in any manner, can be taken by the United States, or by any officer of the same, in the name and behalf of the United States ; and was and is the only law, &c., by which his accountability as paymaster for any money or property of the United States by him received was or is prescribed, regulated or governed ; and that the said John Hall did fully account for all moneys and public property by him, as such paymaster aforesaid, and after he was appointed such paymaster, received, in such sums as the secretary of war, in the said act of congress mentioned, did, at any time after the said John Hall was so appointed as aforesaid, direct to be so received by the said John Hall as aforesaid, according to the tenor and effect, true intent and meaning of the said act of congress.

To this plea, the United States replied, that John Hall, after being appointed paymaster of the rifle regiment in the army of the United States, did, from time to time, receive, as such paymaster, large sums of money, amounting to —— dollars, to be accounted for by him ; and of this amount the sum of —— dollars was altogether unaccounted for by him ; and that upon a final settlement of his accounts as paymaster, by the proper officers of the treasury, he was found indebted —— dollars, which he and the defendants have failed to pay.

The defendants rejoined, stating that John Hall did not receive the sums of money mentioned in the replication as paymaster, in such sums as the secretary of was had, at any time, at or before the receipt of such sums, respectively directed ; according to the provisions, true intent and meaning of the said act of congress, in the three preceding pleas, and in the replications thereto mentioned, prescribing the bonds to be given by the officers

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therein mentioned ; but the said sums of money, amounting to the said sum of _____ dollars as aforesaid, were received by the said John Hall, after being appointed such paymaster as aforesaid, without any direction or order of the said secretary of war, directing the same or any of them to be so received : and so the defendants say, that the said David Ott, in his lifetime, was not, nor were or are the defendants, since his death, liable, bound or in any manner accountable to the said United States, by the force and effect of the said act of congress and writing *obligatory, for the failure of the said John Hall to account and pay to the said United States the [*349] said sums of money, or the said sum of _____ dollars, so found due from the said John Hall to the United States, on account of the said large sums of money received by him, as in the said replication mentioned. The United States demurred to this rejoinder.

The circuit court decided, that the pleas and the demurrers of the defendants were sufficient in law to bar the recovery of the United States ; and gave judgment for the defendants. The United States prosecuted this writ of error.

This case was argued by *Swann* and *Butler*, Attorney-General, for the United States ; and by *Key* and *Jones*, for the defendant.

The United States insisted on the following points : 1. The bond in question is substantially conformable to the requirements of the statute ; and having been executed with the intent of complying therewith, is good as a statutory bond. 2. If it varies from the statute in any material particular, it is yet good, because given voluntarily and for a lawful purpose.

Swann, contended, the bond which had been executed by the defendant's intestate, was substantially a compliance with the provision of the act of congress of April 24th, 1816. If it went beyond the precise directions of the law, it stipulated for no more than was within the duties of the officer by whom it was given.

It was a voluntary bond, and was not coerced from the obligor. He was at liberty to accept or refuse the office ; his sureties were at liberty to execute the bond or to refuse. Even if it is not a bond under the law, it is good and valid, as a voluntary obligation. The replication states that the bond was executed under the belief that it was a compliance with the law, and that as such it was received by the United States ; this was voluntary. It has been decided, that the United States may take a voluntary bond.

As to the objection that the bond was taken to the United States of North America, there cannot be a valid exception on this ground. We are the United States of North America. There are no other United States in North America. Cited, Pet. C. C. 46 ; 3 *W. C. C. 10 ; 1 Gallis. 86 ; [*350] 5 Pet. 115, 388 ; 11 Wheat. 184.

Jones, for the defendant, stated, that he would confine his argument to the act of congress of the 24th of April 1816, and to the powers claimed for the officers of the United States to take any bond they thought proper to ask. It is conceded, that when Hall was appointed, he was required to execute the bond ; and was never called upon to execute any other bond, conformable to the act of congress.

The bond taken substantially varies from the proper bond ; and if the

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sureties shall be held liable on it, it will be a case where, notwithstanding the act of congress requires a particular obligation for the performance of certain duties, it is in the power of the officers of the treasury to demand another and a different bond. Cited, the 6th section of the act of congress (3 U. S. Stat. 298). The section referred to requires that the officer, before entering on his duties, shall give full and sufficient bond for the execution of those duties. There is nothing in the law which gives the option to any officer to take any other bond, or to exercise any powers not granted; and there is, therefore, a prohibition from so doing. If a man is commanded to do an act, he is prohibited from doing any other. If it is an imperative duty of an officer to do a particular act; shall he do an act in disobedience of the law? Every principle which applies to the obligation of contracts forbids this.

Another remark, the secretary at war is commanded to take a particular bond, and the paymaster is commanded to give it, before he enters on the duties of his office; and this is a condition precedent to his entering on those duties as an officer. Until he has performed the condition, the office is in abeyance. The only power to take a bond is that given by the act of congress, and no other power can be exercised than that delegated by the act; and they are limited by it. The officers of the United States act merely ministerially, and can only take the bond established by the law.

Look at the consequences of authorizing officers of the United States to take bonds, at their discretion, in the form they may establish. They could require any form they considered proper, and insist on any terms they might determine. If such bonds can be taken, where are the limitations ^{*351]} imposed by law on their powers? If ^{*this} can be done, the officers may raise a revenue, at their will, from those who will surrender themselves to such powers. The effects of such a principle would be fatal to the government, as it is inconsistent with its purposes and its objects.

Voluntary bonds are distinguished from those which are coerced, by the circumstance that the first are given to secure some certain right, and they may be taken in the exercise of powers, which are to carry the laws into execution, where no particular form is prescribed. In such circumstances, bonds may be taken, provided the person who takes them is so authorized. But the officers of government are not general agents, with full powers as such agents. Their powers are prescribed; and in this case, they are expressly defined; and the bond was not given according to the requirements of the law.

It is an absurdity, to require a person to give a bond for property and money he was not authorized to receive. The duty the government imposed by law, on the paymaster, was, that he should account for money which he received regularly, under officers authorized to pay it to him. Suppose, after he had given a bond in the regular form, other property than that which he had a right to receive as paymaster had been put into his hands, he would not have been accountable for it on his bond: no such liability could exist. This was decided in *United States v. Jones*, 8 Pet. 399. There is no difference between the cases. In the case cited, the contractor was not held liable for moneys paid to him on account of duties not performed within the district for which he was appointed. Yet the contractor voluntarily received the money from the treasury.

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Is this bond within the requisition of the statute? It is said, the bond need not be in the words of the act of congress; but that it is sufficient, if it is substantially the same. If this means that the obligation is not undefined, changed or altered, and the legal effect of it is the same as the statute requires, and in full conformity with the law, this is admitted. But it is denied, that such are the stipulations in this instrument. The obligations contained in it go beyond the directions of the law, and call for duties and acts not recognised by it. It imposes a different mode of executing the duties of paymaster; this is a violation of the law. They are of a different kind from those required of him by the statute; this will appear by an examination of the instrument, and a comparison of the provisions of the act of congress with it.

*This is the case of sureties, and the court will look strictly at the instrument; and will not sustain it, if it is not legal. It is not [^{*352} a case in which a court of equity will reform the instrument, to operate on those who stand in this situation.

The question of great importance is, whether the officers of the government can impose upon those employed under them, obligations which are not known to the law. The constitution forbids this; and it is of the highest interest, that powers of this kind shall not be sanctioned. It is most important, that the duties of an officer shall not be moulded by any but those who establish and regulate the duties, by statute.

The common law is not to be looked into, for analogies to support such assumptions of power. The authority of those who hold public trusts in the United States depends on the precise provisions of statutes. It is among the objects, and entirely consistent with the principles of the common law in England, to sustain the authority of the government, and to supply it with all necessary powers for its support and action. But in the United States, these purposes and principles are supported by express enactments.

Key, also for the defendant in error.—The bond in this case is taken under the statute authorizing the appointment of paymaster, and substantially varies from the bond required by the statute. It does not cover all the responsibilities required by the statute—accounting for property is omitted. And it extends to other responsibilities not required by the statute; the bond enjoins that he shall well and truly discharge all his duties as paymaster, the law only required him to give bond to account; and he has (as the law shows) many other duties. So also, as to his accounting with any other person duly appointed, and to his obeying instructions, &c. The secretary of war has required and taken this as the official bond of the paymaster. If the bond conforms to the law, he had authority; but if not, and he had no authority to take it—it is void.

Two questions, therefore, arise: 1. Where a statute prescribes the bond to be taken by an officer, can he take any other? 2. If he does, is it void?

In our government, every officer must show a power for every official act—a power, either expressly given by the constitution or ^{*353} some law; or necessarily implied from a power so given. If the power is not thus given, it is retained; or, in other words, prohibited. If an officer does an act prohibited, it is void. There is no difference between an act

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expressly prohibited, and an act not issuing from powers given, where the officer is restricted to the powers given. Where is the power given to take this bond? Not in this law, nor in any other. Not in the constitutional power given to the president to execute the laws; for here he violates or supersedes the law.

It was settled in *Tingey's Case*, that where the law of congress prescribes no bond, the executive officer may, under the general power to see that the laws are executed, take a bond. Why? Because it is "within the sphere of its constitutional powers, and appropriate to the just exercise of those powers." But is this so, where the legislature prescribes the bond? There, it is not within its sphere; nor appropriate to supersede the statute, and take a different bond. *Little v. Barreme*, 2 Cranch 177. It is also settled in *Tingey's Case*, that "no officer has a right to require a bond different from that prescribed by the statute." Why? "Because" (say the court) "that would be, not to execute, but to supersede the law." If the bond be void, when *required* contrary to the statute, is it not void when *taken* contrary to the statute? The officer must have a right to take it. If he has a right to *take* it; surely he has the right, and it is his duty to require it. And would not *taking* it, supersede the law as effectually as *requiring* it? There is no power, then, in any law, nor in the constitution either, to take or require this bond.

2. What is the effect of it? It is said to be good, because given voluntarily; or, that it is good so far as it conforms to the statute, and only void for the residue. This doctrine is inferred from two *dicta*: one in Pet. C. C. 46; the other, in 1 Gallis. 86. These cases, and the cases cited, apply only to cases where the objections went to the nature of the stipulations, not to the capacity of the obligee to take, as here. Where the bond is taken between individuals, under no restraint as to power to make the contract, no matter how voluntary, there must still be an officer having power to take *voluntary* bonds for the United States; which there is not. Nor is it good in part; for not being authorized, and therefore (according to our constitution), prohibited from taking a bond with a requisition not in the statute, the bond containing such requisition is wholly *void.
*354] And this is shown by the following cases: 3 W. C. C. 10; *United States v. Hipkins*, 2 Hall's Law Journal 80; 5 Mass. 314; 3 Ibid. 105; 7 Ibid. 98; 5 Pick. 227; 3 Call 421; 2 Wash. 189; 6 East 110; Carter 260; Cro. Eliz. 529, 737; 2 And. 56-7, 108, 152; 2 Saund. 59-60, in notes; 19 Johns. 233.

Again, it is said, it was intended to conform to the statute. The intent cannot make that legal which is illegal. 2 Cranch 177; 2 Call 510; 9 Cranch 39; 3 Mass. 105; 5 Pet. 350. But at all events, *Tingey's Case* shows, that if such a bond is required, it is void. And here, the United States says in the replication, it was required; or was directed by the secretary of war. It is, therefore, void.

Butler, Attorney-General, in reply.—Upon the constitutional question raised by the counsel for the defendant, no dispensing powers are claimed for the officers of the government; and it is admitted, that if congress have really passed a law prescribing the exact form of a bond to be taken, the executive ought to conform to it; and that if an officer materially departs

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from that prescribed form, and compels a paymaster to execute a bond in a different form, the bond so executed will be void. But the United States are not prepared to admit, that this bond will be void, though materially variant from the form prescribed by the statute, if executed voluntarily by a paymaster, and taken in good faith by the executive. On the contrary, it will be attempted to be shown. 1. That if the bond substantially conforms to the provisions of the law, it is valid, and may be enforced. 2. That although it is materially variant from those provisions, if given voluntarily, and for useful and proper purposes, it is yet good. 3. That although one part of the condition of a bond is illegal, it is void only *pro tanto*; and is good for all parts of the condition which are conformable to law.

1. It is contended, that the bond in this case is substantially conformable to the statute. The precise form of the condition of the bond is not given in the statute, nor is this often done. The general tenor and the legal effect are given; and any bond which will produce and secure *the object of the law; which will stipulate for the faithful performance of the [*355 legal duties of the officer, in whatever form of words; will be a good and a valid bond, under this statute. Some facts are to be attended to, which are in the record. It is admitted, Hall had actually been appointed a paymaster in the army. This is in the pleadings; and thus there is an end to the allegation in the argument, that he had not been paymaster. He must have been appointed according to the constitution and to the law. The next admission is, that the bond was executed with intent to comply with the statute. The third fact is, that Hall, after he had executed the bond, entered on the performance of his duties. He became a paymaster as to all third persons, the United States and his sureties. The fourth fact is, that Hall received the money from the United States; and that he has failed to account for the amount so received. The fifth fact to be observed is, that the condition contains two clauses: one, the general stipulation for the faithful performance of the duties of paymaster; the other, special provisions to account for money, property, &c. The counsel for the defendant admit, that the same clause does not go beyond the requirement of this act in effect; though it goes into specifications of details, all of which are included in the words, regularly to account, &c.

It is contended, that the terms of the condition extend only to the faithful performance of the duties of a paymaster; and do not include skill in their execution. The words of the bond are, to account "according to law." This is, in effect, a conformity to the statute. In truth, all the duties required of the officer come within the words "regularly account, well and truly execute, and faithfully discharge." The duties of a paymaster are included in the bond, and no more than these duties; and to this extent, the sureties are bound. The subjection of a paymaster to the rules and articles of war, are liabilities for which the sureties are not answerable; they are responsible for his duties only. Thus, the bond is substantially a compliance with the provisions of the law: but it is contended, that if it exceeds those provisions, and requires that duties shall be performed which should be executed, as it was given voluntarily, it is valid, and binds the sureties. The decision of this court, relied upon in the case of the *United States v. Tingey*, does not deny, but on the contrary, it sustains the *principle which the United [*356 States assert in support of the claim in this case. In that case, the

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pleadings admitted the bond was "extorted;" but here there is no such admission; on the contrary, the bond of Hall, and his sureties, was voluntarily given; with a view to comply with the act of congress. The bond was executed for a lawful purpose. If congress had required such a bond, it would have been entirely proper and consistent with the duties of the officer.

2. It is said, there is no obligee competent to take the bond; and that the constitution and the law do not allow its being taken; nor are powers to take voluntary bonds given; that the executive had authority to take a proper bond, but none to take any other. All this is denied by the United States. To assert these positions, is to say, that a bond for acts which are proper is void; and yet what are the dangers to arise from such a bond? No arguments against the instrument, on the ground of dangers, when none can arise, are available. Nothing was required which was not proper, which was not lawful; and which the officers of the government ought to have a full right to insist upon. Does the direction to take a particular bond imply a prohibition to take another bond, not inconsistent with the prescribed bond? This is contended for by the counsel for the defendant in error.

The United States have established a war department; and the secretary of war has full authority to carry into execution all the purposes of the government, the supervision of which is within that division of the administration of public affairs. No prohibition exists in reference to the action of the officer in charge of that department, if the same is considered proper for the accomplishment of legitimate objects. It is true, that if the secretary of war omits, for any reason, to take security from a public officer, in the precise form from which a statute prescribes, the United States shall lose the benefit of that security, if given voluntarily, and for lawful and proper purpose; a purpose that really effectuates the law; and the only objection to which is, that it is more beneficial to the United States than the one prescribed? If this be the law, the United States is punished for the fault and mistake of their officer. The cases cited by the counsel for the defendant do not support the principles claimed for them.

3. The third question for the determination of the court is, whether, *357] ^{*if the condition of the bond is in part illegal and void (which is denied),} is the whole void? The answer must be in the negative. There is no act of congress prohibiting such a bond, nor is there an act declaring bonds, not conforming to this statute, void. The rule of law is, that in all cases in which the condition of a bond can be severed, it is good for that part which is legal, and only void for that part which is illegal. This rule always applies, except where a statute declares the whole instrument void. 2 Marsh. 61; 12 Wheat. 149. The cases cited on the other side do not impugn these principles. Sheriffs' bonds, taken in a form different from that which the statute authorized, are expressly avoided by 23 Hen. VI. c. 10. So are appeal bonds, in wrong penalties; and which are not divisible.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia, for the county of Washington. The original suit was debt, on a bond given to the United States by John Hall, Daniel Ott and Nicholas B. Vanzandt, on the 26th of May 1818, the condition of which, after reciting that Hall was appointed paymaster of the rifle regiment in the army of the United States, was as follows: "now,

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if the said John Hall shall well and truly execute, and faithfully discharge, according to law, and to instructions received by him from proper authority, his duties as paymaster aforesaid ; and he, his heirs, executors or administrators, shall regularly account, when thereto required, for all moneys received by him, from time to time, as paymaster aforesaid, with such person or persons as shall be duly authorized and qualified on the part of the United States for that purpose, and moreover, pay into their treasury such balance as, on a final settlement of the said John Hall's accounts, shall be found justly due from him to the said United States, then this obligation shall be null and void, and of no effect ; otherwise, to be and remain in full force and virtue."

In the court below, the defendant pleaded six several pleas, and issues were joined on the first, second, fourth and sixth pleas. To the third and fifth pleas the United States replied. The defendant demurred to the replication to the third plea, and rejoined to the replication to the fifth plea ; to which the United States demurred. *Upon these demurrers, the [**358 court below gave judgment in favor of the defendant.

Upon these pleadings, two questions have been made and argued at the bar : 1st. Whether the bond is in conformity to the requirements of the act of the 24th of April 1816, ch. 69, for organizing the general staff, and making further provision for the army of the United States ? 2d. If not, whether the bond is wholly void ; or void only so far as it is not in conformity to that act ?

The act (§ 6) provides, "that all officers of the pay, commissary and quartermaster's department, shall, previous to entering on the duties of their respective offices, give good and sufficient bonds to the United States, fully to account for all moneys and public property which they may receive, in such sums as the secretary of war shall direct." It is plain, that the condition of the bond is not, in its very terms, in conformity with this provision. But the argument on the part of the United States is, that though in terms it varies from the act, yet, inasmuch as all the duties required of the paymaster by law, begin and terminate in matters of account ; that, in substance, the condition includes no more than what the prescribed terms of the act contemplate. In our view of the case, it is wholly unnecessary to decide this question ; because the only breach alleged is the non-accounting for, and non-payment of moneys due to the United States by Hall, upon a final settlement of his accounts. So far as the condition of the bond requires Hall to account for moneys received by him, it substantially follows the provisions of the act of 1816 ; and if the bond be not wholly void, it is clear, that the United States are entitled to recover upon the present pleadings, in whatever way the first question may be decided.

The second question, therefore, is that to which the attention of the court will be addressed. Upon the face of the pleadings, this must be taken to be a bond voluntarily given by Hall, and his sureties. There is no averment that it was obtained from them by extortion or oppression under color of office, as there was in the *United States v. Tingey*, 5 Pet. 115. On the contrary, both the third and fifth pleas are wholly barren of any averments on the subject of the giving of the present bond. All they assert in substance is, that Hall never gave any such bond as is required by the act of 1816 ; and that the act of 1816 was the only law regulating the bonds of paymasters ;

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which some collateral averments not material to be *here mentioned. Now, no rule of pleadings is better settled, or upon sounder principles, than that every plea in discharge or avoidance of a bond, should state positively and in direct terms the matters of discharge or avoidance. It is not to be inferred, *arguendo*, or upon conjectures. Indeed, both these pleas are open to the objection of being merely argumentative, and are wholly destitute in the technical precision necessary for pleas in avoidance or discharge. The replication of the United States to the third plea does, however, exclude, so far as that plea is concerned, any inference of extortion or oppression, *colore officii*; for it avers, that the bond was given with the intent of complying with the act of congress, and by the direction of the secretary of war. It may be added, that the bond is not only voluntary, but for a lawful purpose, viz., to insure a due and faithful performance of the duties of paymaster, a circumstance which must repel any supposition of an oppressive or unjust design.

But passing from these considerations, the question, which first arises, is, whether a voluntary bond, taken by the United States, for a lawful purpose, but not prescribed by any law, is utterly void. This question was elaborately argued in the case of the *United States v. Tingey*, 5 Pet. 115; and upon full consideration, it was there held by this court, that the United States, being a body politic, as an incident to their general right of sovereignty, have a capacity to enter into contracts, and take bonds, in cases within the sphere of their constitutional powers, and appropriate to the just exercise of those powers, through the instrumentality of the proper department to which those powers are confined, whenever such contracts or bonds are not prohibited by law; although the making of such contracts, or taking such bonds, may not have been prescribed by any pre-existing legislative act. The court laid down this as a general principle only, without (as was then said) attempting to enumerate the limitations and exceptions, which may arise from the distribution of powers in our government, and from the operation of other provisions in our constitution and laws. But the court, in applying the principle to the case then before them, further added, "we hold that a voluntary bond, taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is intrusted, to secure the fidelity in official duties of a receiver, or an agent for the disbursement of public moneys, is a binding contract between him and his *360] sureties, *and the United States; although such bond may not be prescribed or required by any positive law. The right to take such a bond is, in our view, an incident to the duties belonging to such a department; and the United States having a political capacity to take it, we see no objection to its validity in a moral or a legal view."

From the doctrine here stated, we have not the slightest inclination to depart; on the contrary, from further reflection, we are satisfied, that it is founded upon the soundest principles of law, and the just interpretation of the constitution. Upon any other doctrine, it would be incompetent for the government, in many cases, to take any bond or security for debts due to it, or for deposits made of the public money; or even to enter into contracts for the transfer of its funds from one place to another, for the exigencies of the public service, by negotiable paper or otherwise; since such an authority is not expressly given by law, in a vast variety of cases. Yet, in

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Dugan v. United States, 3 Wheat. 172, and in the *Postmaster-General v. Early*, 12 Wheat. 136, this right of the government was treated as unquestionable, and belonging to its general functions, as an appropriate incident.

The United States, then, having, in our opinion, a capacity to take a voluntary bond, in cases within the scope of the powers delegated to the general government by the constitution, through the instrumentality of the proper functionaries to whom these powers are confided, this consideration disposes of the whole of that part of the argument, and the cases cited in support of it, which are founded upon the distinction between bonds, which are given to parties having a capacity to take, and bonds which are given to parties who have no such capacity. The former may be good in part; the latter are wholly void.

That bonds and other deeds may, in many cases, be good in part, and void for the residue, where the residue is founded on illegality, but not *malum in se*, is a doctrine well founded in the common law, and has been recognised from a very early period. Thus, in *Pigot's Case*, 11 Co. 27 b, it was said, that it was unanimously agreed in 14 Hen. VIII. 25-6, that if some of the covenants of an indenture, or of the conditions indorsed upon a bond are against law, and some are good and lawful, that in this case, the covenants or conditions which are against law, are void *ab initio*; and the others stand good. And, notwithstanding the decision in *Lee v. Colshill*, Cro. Eliz. 529, which, however, is distinguishable, being founded on a [*361] statute, the doctrine has been maintained, and is settled law at the present day, in all cases where the different covenants or conditions are severable, and independent of each other, and do not import *malum in se*; as will abundantly appear from the case of *Newman v. Newman*, 4 M. & S^rl. 66, and the other cases hereafter stated; and many more might be added.

But it has been urged at the bar, that the doctrine is applicable only to cases where the case stands wholly at the common law, and not where the illegality arises under a statute. And this distinction derives countenance from what was said in *Norton v. Simmes*, Hob. 12, where the distinction was taken between a bond made void by statute, and by common law; for (it was there said) upon the statute of 23 Hen. VI., c. 9, "if a sheriff will take a bond for a point against that law, and also for a debt due, the whole bond is void; for the letter of the statute is so. For a statute is strict law; but the common law doth decide according to common reason; and having made that void which is against law, lets the rest stand, as in 14 Hen. VIII. 15."

In the case of *Maleverer v. Redshaw*, 1 Mod. 35, which was debt, upon a bail-bond, Mr. Justice TWISDEN said, he had heard Lord HOBART say, "that the statute, i. e., 23 Hen. VI., c. 9, is like a tyrant; when he comes, he makes all void. But the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest." But Mr. Justice TWISDEN added, that Lord HOBART put this doctrine upon the ground that the statute of 23 Hen. VI., c. 9, had expressly declared, that if any of the sheriffs, &c., should take any obligation in any other form, by color of their office, that then it should be void. (a) The case in Hobart's reports was put by the court expressly upon this distinction. And it was

(a) See 2 Saund. 55; 1b. 59, Williams' note 8.

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well remarked by Mr. Justice LAWRENCE, in *Kerrison v. Cole*, 8 East 236, that this case is easily reconcilable with the general principle; for sheriff's bonds are only authorized to be taken with a certain condition; and therefore, if they are taken with any other condition, they are void *in toto*, and cannot stand in good part only. But that does not apply to different and independent covenants and conditions, in the same instrument; which may be good in part and bad in part. And so it was held by the whole court in that case; and notwithstanding the instrument (a bill of sale and *mortgage of a ship) was, by statute, declared to be utterly null *362] and void, to all intents and purposes;" yet it was held, that a covenant in the same instrument, to repay the money lent, was good as a personal covenant. The same doctrine was held in *Wigg v. Shuttleworth*, 13 East 87; *How v. Synge*, 15 Ibid. 440; *Mouys v. Leake*, 8 T. R. 411; *Greenwood v. Bishop of London*, 5 Taunt. 727; s. c. 1 Marsh. 292. In this last case, the court took notice of the true line of distinction between the cases, viz., between those cases, where the statute had declared the instrument taken in any other form than that prescribed by the statute, to be utterly void; and those cases, where it had declared the instrument void as to the illegal act, grant or conveyance. It was the case of conveyance affected with simony, so far as the next presentation was concerned; but conveying the advowson in fee. On this occasion, the court said, "There can be no doubt, that the conveyance of an advowson in fee, which is of itself legal, if it be made for the purpose of carrying a simoniacal contract into execution, is void as to so much as goes to effect that purpose; and if the sound part cannot be separated from the corrupt, it is altogether void. It is not, as in the case of usury, and some others, avoided by the positive and inflexible enactment of the statute; but left to the operation of the common law, which will reject the illegal part, and leave the rest untouched, if they can be fairly separated." Here, the doctrine was applied directly to the very case of a statute prohibition.

But the case *Doe dem. Thompson v. Pitcher* (6 Taunt. 359; s. c. 2 Marsh. 61), contains a still more full and exact statement of the doctrine. It was a case supposed to be affected by the prohibitions of the statute of charitable uses, 9 Geo. II., c. 36. Lord Chief Justice GRIBBS, in delivering the opinion of the court, addressing himself to the argument, that if the deed was void as to part, it must be void as to the whole, said: "If the objection had been derived from the common law, it is admitted, that would not be the consequence. But it is urged, that the statute makes the whole deed void. As the counsel for the plaintiff puts it, (a) there is no difference between a transaction void at common law, and void by statute. If an act be prohibited, the construction to be put on a deed conveying *property illegally is, that the clause, which so conveys it, is void, *363] equally, whether it be by statute or common law. But it may happen, that the statute goes further, and says, that the whole deed shall be void, to all intents and purposes; and when that is so, the court must so pronounce, because the legislature has so enacted; and not because the transaction prohibited is illegal. I cannot find in this act, any words, which

(a) Instead of these words, in 2 Marsh. 69, the words are, "the truth is," there is no difference, &c.

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make the entire deed void, &c. I think, this grant of that interest in land, which by the terms of the grant is to be applied to a charitable use, is void ; and that the deed, so far as it passes other lands, not to a charitable use, is good." Such is the clear result of the English authorities.

In this court, a similar doctrine has been constantly maintained. It was acted upon in the case of the *Postmaster-General v. Early*, 12 Wheat. 136. It was taken for granted in *Smith v. United States* (5 Pet. 293), where the objection, indeed, was not taken ; but the bond was not in exact conformity to the statute (act of the 16th of March 1802, ch. 9, § 16), under which it was given by a paymaster. It was also directly before the court in *Farrar and Brown v. United States* (5 Pet. 373) ; where the bond, taken under the act of 7th of May 1822, § 1, wholly omitted one of the clauses required by the statute to be inserted in the condition. The court there entertained no doubt as to the validity of the bond, and only expressed a doubt, whether a breach which was within the direct terms of the omitted clause, and yet which fell within the general words of the inserted clause, could be assigned as a good breach, under the latter. But, if the bond, being a statute bond, was totally void, because the condition did not conform to all the requirements of the act, it would have been wholly, useless to have discussed the other questions arising in the cause.

Upon the whole, upon this point, we are of opinion, that there is no solid distinction, in cases of this sort, between bonds, and other deeds containing conditions, covenants or grants, not *malum in se*, but illegal at the common law, and those containing conditions, covenants or grants, illegal by the express prohibition of statutes. In each case, the bonds or other deeds are void as to such conditions, covenants or grants, which are illegal ; and are good as to all others, which are legal and unexceptionable in their purport. The only exception is, when the statute has not confined its prohibitions to the illegal conditions, covenants or grants ; but has expressly, or by necessary implication, avoided the whole instrument, to all intents and purposes.

*It has been urged, however, in the present case, that the act [*364 of 1816, ch. 69, does, by necessary implication, prohibit the taking of any bonds from paymasters, other than those in the form prescribed by the sixth section of the act ; and therefore, that bonds taken in any other form are utterly void. We do not think so. The act merely prescribes the form and purport of the bond to be taken of paymasters by the war department. It is, in this respect, directory to that department ; and doubtless, it would be illegal for that department to insist upon a bond containing other provisions and conditions differing from those prescribed or required by law. But the act has nowhere declared, that all other bonds, not taken in the prescribed form, shall be utterly void ; nor does such an implication arise from any of the terms contained in the act, or from any principles of public policy, which it is designed to promote. A bond may, by mutual mistake or accident, and wholly without design, be taken in a form not prescribed by the act. It would be a very mischievous interpretation of the act, to suppose, that, under such circumstances, it was the intentment of the act, that the bond should be utterly void. Nothing, we think, but very strong and express language, should induce a court of justice to adopt such an interpretation. Where the act speaks out, it would be our duty to fol-

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low it ; where it is silent, it is a sufficient compliance with the policy of the act, to declare the bond void, as to any conditions, which are imposed upon a party, beyond what the law requires. This is not only the dictate of the common law, but of common sense.

We think, then, that the present bond, so far as it is in conformity to the act of 1816, ch. 69, is good ; and for any excess beyond that act, if there be any (on which we do not decide), it is void *pro tanto*. The breach assigned is clearly of a part of the condition (viz., to account for the public moneys), which is in conformity to the act ; and therefore, action is well maintainable therefor. The case of the *Supervisors of Allegany County v. Van Campen*, 3 Wend. 48, proceeded upon grounds of a similar nature.

Before concluding this opinion, it may be proper to take notice of another objection raised by the third plea, and pressed at the argument. It is, that Hall was not entitled to act as paymaster, until he had given the bond required by the act of 1816, in the form therein prescribed ; and that not having given any such bond, he is not accountable as paymaster for any moneys received by him from the government. We are of a different opinion. Hall's appointment, as paymaster, was complete, when his appointment was duly made by *the president, and confirmed by the senate.

*365] The giving of the bond was a mere ministerial act, for the security of the government ; and not a condition precedent to his authority to act as paymaster. Having received the public moneys, as paymaster, he must account for them as paymaster. Indeed, the condition of the bond having recited that he was appointed paymaster of the rifle regiment, he and his sureties are estopped to deny the fact ; and by the terms of their contract, they undertake, that "he shall regularly account, when thereto required, for all moneys received by him as paymaster aforesaid."

The misdescription of the corporate or politic name of the plaintiffs in the bond, by calling them "The United States of North America," instead of America, is cured by the averment of identity in the declaration ; and, indeed, it has not been insisted on at the argument.

Upon the whole, we are of opinion, that the third and fifth pleas, upon which the circuit court gave judgment in favor of the defendant, are bad in law ; and therefore, the judgment ought to be reversed, and judgment thereon be entered in favor of the United States ; and the cause remanded to the circuit court for further proceedings.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is the opinion of the court, that there is error in the judgment of the said circuit court, in adjudging that the pleadings by the said defendants, in the same cause pleaded, and the matters and things there contained, are sufficient in law to bar the said United States from having and maintaining their action aforesaid ; and it is thereupon ordered and adjudged by this court, that the judgment of the said circuit court be and the same is hereby reversed. And this court proceeding to render such judgment as the said circuit court should have rendered in the premises, it is further considered and adjudged by this court, that the third and fifth

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pleas, so as aforesaid pleaded by said defendants, are not sufficient in law to bar the said United States of their action aforesaid, against the said defendants ; wherefore, the said United States ought, notwithstanding the pleas aforesaid, to recover their debt and damages on occasion of the premises. And it is further ordered and adjudged by this court, that the cause be remanded to the said circuit court for further proceedings thereon, according to law.

*RICHARD SMITH, Lessee of JOHN LANNING, Plaintiff, v. JOHN [*366
VAUGHAN et al.

Certificate of division.

A question whether a plaintiff in ejectment shall be permitted to enlarge the term in the demise, in an action of ejectment, is one within the discretion of the court to which a motion for the purpose is submitted ; and cannot be certified to the supreme court, if the judges of the circuit court are divided in opinion on the motion, under the provisions of the act of congress of the 29th of April 1802.

CERTIFICATE of Division from the Circuit Court of Pennsylvania. At April session 1814, an action of ejectment was commenced by the plaintiff in the circuit court of Pennsylvania ; and after various preparatory proceedings, on the 15th of October 1821, a jury having been impanelled, by agreement of the opposite parties, the term laid in the declaration was enlarged to seventeen years ; and on the 17th of October, 1821, the jury found a verdict for the plaintiff, against Vaughan and others ; on which judgment *nisi* was entered. At October sessions 1826, a *scire facias* to revive the original judgment against Vaughan and others was issued, and after various pleas and demurrers, on the 9th of June 1830, judgment was given for the plaintiff. To April session 1834, of the same court, a writ of *alias scire facias*, issued, at the suit of the same plaintiff, again to revive the original judgment against John Vaughan, Calvin Cone, Timothy Stevens, Oliver Stevens, Joseph Stevens and John Secor, and all other terrenants, was returned "made known."

"And upon the plaintiff's motion for leave to enlarge the term, and to issue a writ of *habere facias possessionem*, questions having occurred before the said circuit court, upon which the opinions of the judges were opposed, to wit, whether leave should be granted to the plaintiff to enlarge the term, and to issue the said writ ; the points upon which the disagreement happened were, during the same term, upon the plaintiff's request, thus stated under the direction of the said judges, and certified under the seal of the said court to the supreme court at the next session, to be held hereafter ; in order that it may by that court be finally decided ; the said direction of the justices, being accompanied with this opinion, that this is a *collateral motion to amend, depending on the discretion of the court, under all [*367 the circumstances of the case, as they appear of record, or are disclosed by affidavits ; and in their opinion, does not come within the provisions of the act of 1802 (2 U. S. Stat. 159) ; but as the counsel of the plaintiff think otherwise, and are desirous of taking the opinion of the supreme court on the subject ; the objection to certifying the point of difference will be

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reserved for their consideration ; and the clerk was directed to make out the certificate accordingly."

The clerk of the circuit court, on the 7th day of January 1825, sent up the following certificate with the record. "I certify the foregoing to be a true statement of the points upon which the opinions of the judges of the circuit court of the United States for the district of Pennsylvania, in the third circuit, were opposed; stated under the direction of the said judges."

Ingersoll moved to dismiss the cause, on the ground, that the points certified from the circuit court did not come within the provisions of the act of congress of the 29th of April 1802.

THE COURT ordered it to be certified to the circuit court, as the opinion of the court, that it cannot take cognisance of the question certified, the cause being one resting entirely in the discretion of the circuit court, and therefore, clearly not within the act of congress of the 29th of April 1802.

*368] *THOMAS P. CROWELL, Garnishee of the CHESAPEAKE and DELAWARE CANAL COMPANY, v. JOHN RANDELL, JUN.¹

RICHARD SHOEMAKER, Garnishee of the CHESAPEAKE and DELAWARE CANAL COMPANY, v. JOHN RANDELL, JUN.

Error to state courts.

The 25th section of the judiciary act of 1789 confers appellate jurisdiction on the supreme court from final judgments and decrees in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had, in three classes of cases : first, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity ; secondly, where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity ; thirdly, where is drawn in question the construction of any clause of the constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission ; the section then goes on to provide, that no other error shall be assigned or regarded as a ground of reversal, in any such cause as aforesaid, than such as appears upon the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions or authorities in dispute.

In the interpretation of this section of the act of 1789, it has been uniformly held, that to give this court appellate jurisdiction, two things should have occurred and be apparent in the record : first, that some one of the questions stated in the section did arise in the court below ; and secondly, that a decision was actually made thereon, by the same court, in the manner required by the section ; if both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show, that such a question might have occurred, or such a decision might have been made, in the court below ; it must be demonstrable, that they did exist, and were made.

It has been decided, that it is not indispensable that it should appear on the record, *in toto*, or by direct and positive statement, that the question was made, and the decision given by the court below, on the very point ; but that it is sufficient, if it be clear, from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment.

A review of the cases of *Owings v. Norwood's Lessee*, 4 Cranch 344 ; *Smith v. State of Maryland*, 6 Ibid. 281 ; *Martin v. Hunter's Lessee*, 1 Wheat. 304 ; *Inglee v. Coolidge*, 2 Ibid. 368 ;

¹ This case, in the court of appeals of Delaware, is reported in 1 Harrington 565.

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Miller v. Nichols, 4 Ibid. 311, 315; **Williams v. Norris**, 12 Ibid. 117, 124; **Hickie v. Starke**, 7 Pet. 98; **Wilson v. Blackbird Creek Marsh Association**, 2 Ibid. 245, 260; **Satterlee v. Mathewson**, Ibid. 380; **Harris v. Dennis**, 3 Ibid. 292, 302; **Craig v. State of Missouri**, 4 Ibid. 410; **Fisher v. Cockerell**, 5 Ibid. 256; **Mayor of New Orleans v. De Armas**, 9 Ibid. 284.

In order to bring a case for a writ of error or an appeal to the supreme court, from a court of the highest jurisdiction of any of the states, within the 25th section of the judiciary act, it must appear on the face of the record: 1st, That, some one of the questions stated in that section did arise in the state court; 2d, That the question was decided by the state court, as required in the same section; 3d, That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipso iuncto verbo*; but that it is sufficient, if it appear by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to have induced the judgment; 4th, That it is not sufficient, to show that a question might have arisen or been applicable to the case; unless it is further shown on the record, that it did arise, and was applied by the state court to the case.¹

ERROR to the Superior Court of the state of Delaware. In 1829, John Randell, Junior, the defendant in error, instituted an action of covenant against the Chesapeake and Delaware Canal Company, in the superior court of the state of Delaware, on certain articles of agreement entered into between him and the defendants, relative to the making of a canal, to unite the waters of the river Delaware with those of the Chesapeake bay, and to pass through the states of Delaware and Maryland. The Chesapeake and Delaware Canal Company were incorporated by laws passed by the states of Pennsylvania, Delaware and Maryland; and the board of directors of the company was established in the city of Philadelphia.

The declaration alleged sundry breaches of covenant on the part of the defendants, and after various pleadings and demurrers, and issues of fact, judgment was rendered for the plaintiff on some of the demurrers, and an inquisition of damages awarded. The parties went to trial on some of the issues of fact, which were found for the plaintiff; and on the 25th day of January 1834, the jury found a verdict for the plaintiff, for \$229,535.79, upon which a judgment was entered by the court.

Upon this judgment, the plaintiff, on the 6th of June 1834, issued a writ of attachment, under the laws of the state of Delaware, for the collection of part of the amount of the same, and of the costs; which was served on Thomas P. Crowell, as the garnishee of the Chesapeake and Delaware Canal Company. The same proceedings took place in the case of Richard

¹ **Choteau v. Marguerite**, 12 Pet. 507; **Ocean Insurance Co. v. Polleys**, 18 Id. 157; **Bank of Kentucky v. Griffith**, 14 Id. 56; **Coons v. Gallerger**, 15 Id. 18; **Commercial Bank v. Buckingham's Executors**, 5 How. 317; **Maxwell v. Newbold**, 18 Id. 511; **Railroad Co. v. Rock**, 4 Wall. 177; **The Victory**, 6 Id. 882; **Hamilton Co. v. Massachusetts**, Id. 632; **Gibson v. Choteau**, 8 Id. 314; **Worthy v. Commissioners**, 9 Id. 611; **Insurance Co. v. Treasurer**, 11 Id. 204; **Knox v. Exchange Bank**, 12 Id. 379; **Northern Railroad v. People**, Id. 384; **Cockcroft v. Vose**, 14 Id. 5; **Steines v. Franklin County**, Id. 15; **Kennebec Railroad v. Portland Railroad**, Id. 23; **Hurley v. Street**, Id. 85; **Caperton v. Bowyer**,

Id. 216; **Commercial Bank v. Rochester**, 15 Id. 639; **Murray v. Charleston**, 96 U. S. 432; **Choteau v. Gibson**, 111 Id. 200. The certificate of the state judge, that a federal question did arise and was decided, is not alone sufficient to confer jurisdiction; it must in some way appear upon the face of the record. **Commercial Bank v. Buckingham's Executors**, *ut supra*; **Lawler v. Walker**, 14 How. 152; **Railroad Co. v. Rock**, 4 Wall. 180. The office of such a certificate is, to make more certain and definite what is too general and indefinite in the record; but it is not sufficient to originate the question. **Parmele v. Lawrence**, 11 Wall. 36. And see **Caperton v. Bowyer**, 14 Id. 214.

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Shoemaker. The defendants respectively appeared, and pleaded that they had *no goods or effects, rights or credits, of the company, in their hands, at the time of the attachments, or at any time after. The cases came on for trial on these pleas and issues, according to the laws of Delaware ; and the parties agreed to a statement of facts. In the suit against Thomas P. Crowell, the agreed facts were as follows :

" John Randell, Jun., recovered a verdict of a jury, in the said court, against the said company, on the 25th day of January 1834, and then and there obtained judgment in the said court, against the said company, for damages and costs of suit, amounting together to the sum of \$229,535.79. The pleadings, record and proceedings in the said suit, from the declaration to the judgment inclusive, are referred to, and form a part of this case. A writ of attachment was issued upon said judgment, for the collection of the damages and costs aforesaid, on the 6th day of June, A. D. 1834, returnable to the November term of the same year. The said writ was served upon the said Thomas P. Crowell, in the county aforesaid, at the Delaware tide-lock, who was summoned by the sheriff of Newcastle county, as garnishee of the Chesapeake and Delaware Canal Company, on the 15th day of June 1834. At the same time, the said Thomas P. Crowell was arrested by virtue of the above-mentioned *capias*, being No. 34, to November term of said court, A. D. 1834, at which time and place, the said defendant (the said Thomas P. Crowell, to wit) having appeared and given bail, and being put to plead, at the election of the said plaintiff, under the said act of assembly, pleaded that he had no goods, chattels, rights, credits or effects of the said the Chesapeake and Delaware Canal Company, in his hands, custody or possession, at the time of the attachment laid, or at any time after. On this plea, the plaintiff hath joined issue, and this is the question now submitted to the court for their decision.

" On the 28th day of January, A. D. 1834, a resolution was passed by the board of directors of the Chesapeake and Delaware Canal Company, in the following words, that is to say : ' Resolved, That hereafter no tolls be collected on the line of the canal on any vessel, cargo or other article passing through the canal, until the said vessel, cargo or other article on which the said tolls may be levied or charged, shall have entered the basin at the western end of the canal ; excepting only such vessels, cargo or other *371] article as may not pass through the canal to the said basin.' This resolution has never been printed by the said company, nor hath any notice whatever thereof been given to the said John Randell, Jun., until this time. It is admitted, that the said resolution was adopted for the purpose of preventing the said John Randell, Jun., from attaching the tolls of the said company, by virtue of the said judgment ; or otherwise availing himself of the jurisdiction of the courts of the state of Delaware, for the collection of his said judgment.

" The defendant, at the time of the service of the said writ of attachment and *capias* upon him, was, hath ever since been, and still continues to be, the master of the schooner Hiram ; the said schooner being in his hands and possession, during that time, as the master of the same, and owner of the said schooner. The said vessel passed through the Chesapeake and Delaware canal, with a cargo from Philadelphia to Richmond, on the 16th day of June, A. D. 1834. The amount of tolls on the several cargoes of the

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said schooner, demanded for passage through the said canal, between the 16th day of June, and the return-day of the said writ, was \$96.28, lawful money of the United States of America, and was paid, in the city of Philadelphia, to S. Griffiths Fisher, an officer appointed by the said president and directors of the said the Chesapeake and Delaware Canal Company, to receive and collect tolls, at their office in the city of Philadelphia, by a certain Joseph Hand, the freighter of the said schooner ; after service of said attachment and *capias*, and after the said vessel had passed through the canal as aforesaid, but before the return of the said writs. The said attachment and *capias* were served upon the said defendant, in Newcastle county, at the time of his offering to pass through the said canal at the Delaware tide-lock, with the said vessel and cargo, and previous to the vessel passing through the same, to wit, on the 15th day of June, A. D. 1834. The said tide-lock was, when the said canal was opened for navigation on the 17th of October, A. D. 1829, established by the president and directors of the said company, as a place for the receipt of tolls in the said canal ; and a collector of tolls has always been appointed to reside at that place ; and a certain John Wilson was, at the time of issuing said attachment, and has ever since been, such collector at said tide-lock.

"The printed paper hereunto annexed, marked with the letter A, *is a true copy of the regulations to be observed by vessels navigating the Chesapeake and Delaware canal, adopted by the board of directors of the said company, with the rates of toll for navigating the said canal, the same having been signed by the president and secretary of the said company, and published by order of the president and directors thereof ; and it is agreed, shall be taken as a part of the case ; except so far as they had been altered by the resolution of the 28th of January above set forth."

[The material regulations in the paper A, established the 4th of February 1833, were the following : 1. No vessel shall enter the canal, without first coming to anchor, or making fast to the piers, at least one hundred feet from the outer locks. 2. Masters of vessels shall, before entering the first lock, present to the collector a manifest of cargo, so arranged as to enable him readily to calculate their tolls. And in order to guard against frauds, the collectors are authorized to require the cargo to be landed for examination, if they shall see cause to suspect the correctness of the manifest. 5. The tolls shall always be paid at the first lock passed by a vessel ; and upon payment thereof, the master shall receive a pass-bill, on which shall be noted the amount of tolls paid, and the precise time of entering. 7. If any vessel shall pass through the canal, without fully and honestly paying the prescribed tolls, either of the collectors is authorized by law "to seize such vessel, wherever found, and sell the same at auction, for ready money ; which, so far as is necessary, shall be applied towards paying said tolls, and all expenses of seizure and sale." And to enforce the penalties : 21. The officers and agents of the company are fully authorized by law to enforce obedience to the foregoing regulations ; and they are required so to do. 22. No person is allowed to interfere with the agents or officers of the company in the performance of their duties on the canal. Should reasonable ground of complaint occur against such officers or agents, either by unnecessary delays or improper conduct, it will be immediately redressed, on information being lodged at either of the offices of the company.]

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"It is further agreed, that the sloop Robert and James, the defendant being then and there master, and having the direction *thereof, passed [373] through the Chesapeake and Delaware canal, with a cargo from Port Deposit to Philadelphia, on the 18th of June 1834, and three several times afterwards, to wit, on the 26th day of June 1834, on the 16th day of October 1834, and on the 5th day of November 1834, between that day and the return-day of the said writ of attachment. Copies of the pass-bills given to the said defendant on these occasions were annexed. The amount of tolls on the several cargoes of the said sloop, demanded for passage through the said canal, by the Chesapeake and Delaware Canal Company, at their lock, at the western end of the canal, in the state of Maryland, and there paid by the said Thomas P. Crowell, master of the said sloop, between the said 18th of June and the return-day of said writ, was \$74.44, lawful money of the United States of America.

"The acts of the legislatures of Delaware, Maryland and Pennsylvania, relative to the said the Chesapeake and Delaware Canal, and the several supplements thereto are referred to, and made part of this statement of facts.

"It is agreed, that in many cases since the resolution of the 28th of January 1834, above set forth, tolls for the passage of vessels and their cargoes through the Chesapeake and Delaware Canal, from the eastern end of said canal, in the state of Delaware, to the western end thereof, in the state of Maryland, were received by some agent appointed by the president and directors of the said company, at their office, in the city of Philadelphia; and were paid by the owners or captains, or by the agents of said owners or captains, to the officers or agents of said president and directors of said company at said office.

"It is further agreed, that independently of the tolls so attached, and all other tolls of the said company attached by the said John Randell, Jun., a sufficient amount of tolls was always left in their hands, not attached, to repair and keep in order the said canal, their locks, and other works necessary thereto, and to keep the same navigable; also to defray the expenses of the collection of tolls, including the salaries of all their officers. It is further agreed, that the said canal, the construction of which was commenced on the 15th day of April 1824, was completed and open for navigation on the 17th day of October 1829.

"It is also further agreed, that previous to the rendition of the judgment above named, obtained by John Randell, Jun., against the said [374] canal company, the tolls were collected on the canal, at the respective toll-houses, located in Delaware city and Chesapeake city, from the captains and masters of vessels passing through the said canal; but the counsel for the said defendant protests that said captains and masters were not personally liable to the said company for the said tolls so paid by them. If, upon the foregoing statement of facts, the court shall be of opinion, that John Randell, Jun., the above-named plaintiff, is entitled to judgment against the defendant, as garnishee of the said the Chesapeake and Delaware Canal Company, upon the plea of *nulla bona*, then judgment to be rendered for the said plaintiff for the sum of \$96.28; and if this court should be of the opinion that the said John Randell, Jun., is not entitled to judgment against the said defendant, on the aforesaid statement of facts, the judgment to be entered for the said defendant."

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The following extracts from the laws of Maryland and Delaware were made part of the case :

Extract from Delaware law, passed February 1832.

"Be it enacted, that in case any master, shipper or agent, shall fraudulently present to the collector of tolls, or other agent of the canal company, a false manifest or account of cargo of any vessel or boat about passing through the canal, or give a false statement of the tolls thereon, or otherwise attempt to defraud in the said tolls, on conviction thereof, before any justice of the peace for Newcastle county, he or they, so convicted, after paying to the canal company the toll due, and the cost of ascertaining the same, shall forfeit and pay double the amount of tolls so charged, on which the fraud had been attempted: on moiety of said forfeiture shall inure to the person giving information and prosecuting the offence to conviction, the other moiety to inure to the state of Delaware."

Extract from Maryland law, passed December 1831.

"Be it enacted, &c., that if any master or agent of any vessel or boat shall fraudulently present to the collector of tolls, or any other agent of the Chesapeake and Delaware Canal Company, a false manifest or account of cargo of any vessel or boat about passing through the canal, or give a false statement of the toll thereon, or otherwise attempt to defraud in the said tolls, on conviction thereof, before any justice of the peace of this state, he shall incur the penalty of twenty dollars, to be recovered before some justice of the peace, as small debts are recovered, one-half to the informer giving *information and prosecuting the offender to conviction, and [§375 the other half to the state."

On this agreed statement, the case was certified to the court of errors and appeals, for argument and decision; and in October 1835, the court decided, that the defendant had goods and chattels, effects and credits, &c., of the company, in his hands, at the time of the attachment laid in his hands, and before the return thereof, amounting to \$95; and judgment was rendered in favor of the plaintiff. The record and proceedings were remanded to the superior court of the state of Delaware, and the defendants prosecuted this writ of error.

The case of Richard Shoemaker differed from that of Thomas P. Crowell only in this; that in his case it was necessary for the court to decide, in order to render judgment for the plaintiff, that the voluntary payment of toll by a master of a vessel, to a person appointed by the directors of the company to receive said toll, in Philadelphia, was, under the facts stated in this case, a fraud on the attachment-laws of the state of Delaware, and on the jurisdiction of its courts; and especially fraudulent, and therefore void, as against a judgment-creditor of the company seeking satisfaction of his debt in that state, according to the attachment-laws thereof: and the court so decided.

Webster and *Clayton* moved to dismiss the cases, for want of jurisdiction.

Webster :—The whole case appears on the record; and the court, on inspecting it, will find there is nothing which can give jurisdiction. The proceeding of the plaintiff was an attachment to recover the amount of a judgment, or such part of the same as was in the hands of the defendant in

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the attachment ; who was a debtor to the Chesapeake and Delaware Canal Company for tolls, to which his vessel and cargo were subjected, according to the charter of the company, for passing through the canal. The judgment obtained by the defendant in error was in a case in which no constitutional question arose; nor was the construction of any treaty or law of the United States involved. It was simply a proceeding on a contract, which the *378] plaintiff alleged the defendant had violated ; and in which the jury gave him a verdict for a large sum as damages.

Nor do the agreed facts give justification. On them, no question is presented upon which the court could decide. The matter in the statement is such as the courts of the state of Delaware had full cognisance of ; and in the proceedings of the courts of Delaware on those facts, no question was raised which can come under the revision of this court.

In the early cases, it seems to have been expressly required, that the law of the United States, or the state law, or a treaty which was asserted to be misconstrued, should be expressly stated ; and unless it appeared to have been fully and expressly stated, what law of the United States, or of the state, or constitutional provision had been violated, this court will not take jurisdiction. This has been relaxed, and jurisdiction has been sustained, where it appeared on the face of the record, that the court to which the writ of error was directed could not have given judgment without having misconstrued the law. *Craig v. State of Missouri*, 4 Pet. 410.

In the attachment suit, there was a plea of " *nulla bona* ;" and on this issue, it is not seen, how a question arose which could give this court the revisory power sought in the case. The defendants had no visible property to satisfy the judgment of Mr. Randell ; and he proceeded by an attachment of the tolls payable to the company, according to the fixed regulations established by them, and in full force at the time of the proceeding. The courts of Delaware thought the removal of the collection of the canal tolls to Philadelphia was a fraud on Mr. Randell ; that the canal tolls were, by the charter, payable, and should be paid, on the canal. The question was, whether the tolls were so payable ; and the courts of Delaware so decided. The 25th section of the judiciary act requires that the point which this court may decide, on a writ of error to a state court, shall be settled precisely by the court. It is important, that it shall appear what is decided. On the record in this case, this cannot be done. The judgment of the court of Delaware, on the question, whether the garnishee had or had not goods in his hands belonging to the Chesapeake and Delaware Canal Company, could be decided, without affecting, and would not necessarily involve the decision of, a constitutional question. Cited, the Attachment Laws of Delaware.

The judicature of Delaware is of the highest respectability, and *377] *it has no disposition to evade the provisions of the constitution, or to claim jurisdiction which it has not. The defendant in error, to obtain satisfaction of a judgment now exceeding \$250,000, has been obliged to resort to the courts of Delaware ; and to institute a number of suits, by attachment, for the sums which do not exceed or amount to \$100. The courts of Delaware considered him entitled to relief, under the laws of the state ; and did not consider the question as one which was to be affected by any other than those laws.

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Sergeant, for the plaintiff in error.—A great many questions and interests are involved in this case ; but the single point now before the court, or which can now be considered, is, whether there is so much shown in the record, as to give this court jurisdiction to examine and revise the judgment of the court of Delaware. We are not now to discuss whether the laws of Delaware are inconsistent with the constitution and laws of the United States ; and to have the same now decided. We now maintain the plaintiffs have a right to be heard on this question, when the case comes on regularly for argument ; and this will be shown. The plaintiffs in error present the question, whether the acts of the legislature of Delaware, and the application of those acts, were inconsistent with the rights which the Chesapeake and Delaware Canal Company acquired, under the charters of Pennsylvania, Delaware and Maryland. If they were, the plaintiff below was entitled to judgment ; but if not, then the judgment violated the constitution of the United States. Whether the acts of the assembly of Delaware, under which the plaintiff below proceeded, were valid or invalid, decides the question in the case.

It is admitted that the plaintiff in error is bound to sustain the jurisdiction of the court. The court will find the whole case in the agreed statement ; and both cases are alike, except that in Shoemaker's case, the tolls were paid in Philadelphia, before the attachment was laid on him, as the garnishee of the company.

Is there any question presented by the record, of which this court has cognisance ? The allegation is, that the laws of the state of Delaware, as applied to this corporation, are repugnant to the charter, and therefore, violate the charter ; and are thus contrary to the constitution of the United States, art. 1, § 10, 1. What the laws of the state of Delaware *are, [*378 must be known by the decisions of the courts of that state. The construction given to them by those courts is here to be assumed to be right; and the same is not to be brought in question. It is not the subject of re-examination in this court, and is to be taken as final and conclusive.

The question then is, whether the laws, thus construed, are not unconstitutional and void ; so far as they apply to the corporation of the Chesapeake and Delaware Canal Company, and to persons using the canal ? It is not meant, or intended to be said, generally, that they are unconstitutional ; a law may be good in part, and bad in part ; it may be good as applied to one person, and bad as applied to another.

It is maintained, that it does sufficiently appear in the record, that the law of Delaware is unconstitutional and void, as to those parties. It need not appear, that the question was made in the state court. It need not be stated in the record, that the constitutionality of the law of a state came in question ; it is not required, that in the court below the question was considered. All that is requisite is, that such a question was applicable to the case. *Martin v. Hunter's Lessee*, 1 Wheat. 304 ; *Inglee v. Coolidge*, 2 Ibid. 363 ; *Miller v. Nicholls*, 4 Ibid. 311 ; *Lanusse v. Barker*, 3 Ibid. 101 ; *Wilson v. Blackbird Creek Marsh Association*, 2 Pet. 245 ; *Satterlee v. Mathewson*, Ibid. 409 ; *Harris v. Dennie*, 3 Ibid. 292 ; *Davis v. Packard*, 6 Ibid. 41 ; *Williams v. Norris*, 12 Wheat. 117.

Are the laws under which the plaintiff in the Delaware court proceeded, inconsistent with the charter of the company, and thus uncon-

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stitutional? The fourth section of the act of February 10th, 1829, provides, that "an attachment may be laid on toll due, and to become due;" and that the proceedings may be the same as in other cases of attachment. What are the proceedings "in other cases of attachment?" They will be seen by a reference to the act of the legislature of Delaware, of the 24th of March 1770 (Laws of Delaware 462); and particularly by a reference to the third, sixth and seventh sections; the last particularly. The third section authorizes the attachment of the effects of an absent debtor, and allows the sheriff to take possession of them in the hands of any one with whom they may be found, unless security is *given [379] for them; which security will be liable for the amount, unless the debtor in the attachment puts in special bail to appear to the suit, and abide by its result. The sixth section directs the proceedings against the garnishee, who may, through the verdict of a jury, be made liable for all the effects of the defendant in his hands at the time of the attachment, and up to the time of judgment. The seventh section, on an affidavit that the garnishee has effects of the debtor in his hands, and is about to depart; authorizes a *capias* against him, on which he is to give sureties to appear, make answer, and abide the judgment of the court. The effect of these sections is, to deprive the company of all right to collect the tolls of the canal; and to put into the power of any creditor to appropriate them to his own use, and to the satisfaction of a debt due to him. Thus, the whole of the rights of the company to tolls are suspended; and the contract formed between the state of Delaware and the company, by the charter, is defeated and annulled. The attachment law, then, as applied to the case before this court, violates the compact between the states of Maryland, Pennsylvania and Delaware, and with all the corporations, and with the citizens of the United States. Maryland owns \$50,000 of stock in the company: Pennsylvania \$100,000: and the United States \$450,000.

That this is true, that the contract of the charter is thus violated, is shown by the following examination of the charter:

1. By the ninth section of the act of Maryland, of the 7th of December 1799, the company have a right to demand and receive the tolls at such places, on the canal, as they may direct. The ninth section of the act of Delaware, of the 29th of January 1801, and the act of Pennsylvania, of the 19th of February 1801, adopt the law of Maryland; and certain stipulations are made for Maryland. The attachment law of Delaware, as it has been applied in this case, is in direct contravention of these positive stipulations. The company, by the application of the attachment law to the tolls, are not permitted to demand and receive the tolls. They are demanded and received by another. This is a plain violation of the contract.

2. By the eleventh section of the charter of Maryland, and the tenth section of the charter of Delaware, the canal is declared a public highway, on payment of tolls, as fixed and regulated. It is, of course, free to every citizen of the United States coming to the canal, and paying the collector at a place on the canal. *By the application of the attachment laws to [380] this case, such a person cannot pass. 1. He is not allowed to pay the collector and go on. 2. He cannot pass toll free, if the company are willing he may do so. 3. He cannot pass, although he has actually paid the company. He is liable to suit; and he is liable to arrest.

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Clayton, in support of the motion.—The court of Delaware decided this cause on the ground of fraud on the laws and the rights of the defendant in error. No question worthy of the name of a question of constitutional law was, or could have been presented to that court.

It has been laid down by this court, (a) that “every creditor must be presumed to understand the nature and incidents of a corporation, and to contract with reference to them;” and it is a settled principle, that when the charter or act of incorporation prescribes the mode which the officers or agents of a corporation must act or contract, to render their acts or contracts obligatory on the corporation, that mode must be strictly pursued. For the act of incorporation is an enabling act; it gives the corporate body all the power it possesses; it enables it to contract; and when it prescribes the mode of contracting, the mode must be observed, or the instrument no more creates a contract, than if the body had never been incorporated. (b) Lord ELDON has said, “it is necessary to confine the powers given to canal companies, strictly within the limits of such powers.” (c) And the principle, as applicable to all corporations, has been stated by this court. (d) It is believed, that this rule has been adopted in every state in the Union. (e)

Randell, as a contractor with this canal company, dealt with it on the faith of its charter. According to the rule laid down by this court (8 Pet. 287), he must be presumed to have “contracted with reference to its incidents.” By the third section of the charter, it is expressly provided, that a contractor shall be paid out of the tolls imposed by *the act; and the eighth section of the charter prescribes the places for collecting [*381 tolls, to be “such place or places, on the canal, as the directors may hereafter direct.” By the regulations and by-laws, annexed to the statement of these cases, it appears, that such places were directed and established: to wit, “the toll shall always be paid at the first lock passed by a vessel,” and the collectors of tolls are “required to enforce” this rule. The Delaware tide-lock was one of those places thus established, at the time of these attachments. Randell now only claims that the company, and all other persons dealing with it, shall be held to the law of the charter, and that no person having direction of a vessel, may be suffered to pass toll free, or without paying toll on the canal. But the directors of this company have collected toll in Philadelphia, and not on the canal. By these means, if lawful, the payment of his judgment will be completely defeated. For if it be lawful to collect tolls out of the canal, they may as well collect them in New Jersey, as in Pennsylvania; and may remove all the toll-houses out of any state jurisdiction, long before he can obtain a judgment and process within it. They can thus defeat any creditor. This salutary provision in the charter was made, for the very purpose of retaining some jurisdiction over

(a) *Mumma v. Potomac Company*, 8 Pet. 287.

(b) *Head v. Providence Insurance Co.*, 2 Cranch 166; *Shand v. Henderson*, 2 Dow 521.

(c) The same rule was laid down in *Goldin v. Oswald*, 2 Dow 534—5.

(d) *Beaty v. Lessee of Knowler*, 4 Pet. 168.

(e) The case of the *Utica Insurance Company*, 15 Johns. 381; 2 Cow. 419, 664; 7 Ibid. 462; 6 Pick. 82; 5 Conn. 580; 8 Serg. & Rawle 222; 14 Mass. 58; 17 Ibid. 29.

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this company, to compel payment of its debts, and enforce a compliance with its obligations ; and if it had been omitted, the company would have been reached by no other state or power. It is but an affirmation, too, of the old common-law principle, that " toll bars cannot be erected out of the place for which toll is demanded."(a)

If this company can thus collect tolls, out of the states which chartered it, it can defeat the payment of the *bonus* reserved by Maryland, which is a share of the net profits on the tolls. Delaware has, by a subsequent act, repealed the section which reserved a share of the tolls for her benefit ; but she has substituted a provision in lieu of it, for the benefit of the public, viz., "that whenever and so long as the net profits arising from the said tolls, shall amount to fifteen per centum per annum ; the company shall lessen the rates of toll fixed by the said act, so that the same shall not exceed twelve per centum per annum." The public is thus interested in the faithful collection of the tolls, according to the charter. But if toll be collected in Philadelphia, a vessel may take in a new cargo, before she arrives at the tide-lock in the canal, and pass toll free with it.

*The rights of the public are also encroached upon, by this illegal *382] mode of collecting tolls, in another most important particular. The charter provides for the perpetual maintenance and preservation of the canal as a highway; and directs the tolls to be applied to that object. Any change in the plan of taking toll, may encroach on this public right. The principle of the decision in the case of *Lees v. Manchester and Ashton Canal Company*, 11 East 856, is full on the very point. Lord ELLENBOROUGH there says, "the public have an interest that the canal shall be kept up ; and whatever has a tendency to bring it into hazard, is an encroachment upon their rights in it. They have also an interest that the tolls shall be equal upon all ; for if any are favored, the inducement to the company to reduce the tolls, generally, below the statute rate, is diminished." Hence, in that case, the court decided, that a contract to pay toll in any other way than according to the charter, was absolutely void.

In the charter of this canal company, there is power given to reduce the tolls below the statute rate, by the proviso to the ninth section. Apply this doctrine first to Crowell's case. He paid no toll, when he passed the canal with his vessel ; nor was any paid, till months after. He passed toll free. It was a fraud on public rights, as well as the private rights of Randell. Then apply the same principle to Shoemaker's case. He paid in Philadelphia, before he went through the canal. He might have taken in a new cargo of ten times the amount of that on which he paid toll, anywhere between Philadelphia and the Delaware tide lock in the canal, which are nearly fifty miles apart ; and by this arrangement, it would have passed toll free. For that very reason, therefore, that his payment of toll in Philadelphia might affect other interest, his payment was a nullity. It was a voluntary payment, to avoid authority ; in fraud of the rights of the attaching creditor, and of the rights of the public. As a fraud, the court below regarded it, and held it, as against the creditor, absolutely void. And even against the stockholders themselves, the payment ought to have been adjudged void, if that case had arisen. It was made by order of the direc-

(a) 6 Com. Dig. 862, Toll, E: Bunb. 64.

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tors only, and they are but agents of the corporation, who have clearly no power to bind their principal beyond the authority limited by the act of incorporation.(a) Any one *stockholder had a right to treat the payment in Philadelphia as a legal fraud, in plain violation of his vested rights under the charter. But this was not the case presented. It was the case of a creditor, as to whom, *a fortiori*, there can be no pretence that the payment was binding.

There is also a clause in the charter which provides, that "the same rate of tolls shall be paid on articles passing from Chesapeake to Delaware, as upon those paid from Delaware to Chesapeake." § 9. This clause is violated in Crowell's case, and also in Shoemaker's. In Crowell's case, no toll was paid at either end of the canal, at the time of passing, but an indulgence of some months was granted, before any payment; while other persons paid, at or before the time of passing, and while there was a standing by-law directing all to pay on the canal. The amount of his tolls from Chesapeake to Delaware was really less than the amount paid by him from Delaware to Chesapeake, as the case shows. The value of the indulgence in the former case, therefore, was greater than in the latter. In this way, the company may establish what would be equivalent to a discriminating duty in favor of the commerce of Philadelphia, and cut up the commerce of Baltimore; the very thing which the charter intended to prohibit. They may thus agree, with every man passing from Philadelphia to wait for the toll; while they rigorously enforce payment on all coming from Baltimore. They may grant this indulgence only to those who trade from the favored city.

If it be pretended, that they have the power to do this, under the general authority given them to lessen the tolls; the answer is, first, this authority can be exercised only by the stockholders, at a general meeting, at which proprietors having five hundred shares of stock must be present; whereas, in this case, the directors alone have reduced the toll: and secondly, the power given to the company to lessen the tolls, is not a power to reduce the tolls at one gate or lock, and not at the other. It has been decided, in a similar case, that tolls cannot be reduced at one toll-gate, and not at the other.(b)

This company has no power to commute with any person for tolls. That power can never be exercised, unless expressly conferred. It is a power often to be found in the common turnpike acts passed by the states, but not in any canal act which is known. The reason for this will be found in the jealousy with which the legislatures *regard all power to give commercial advantages to one port or place over another. Yet the contract to receive toll in Philadelphia, is really a commutation for toll; and if sustained, there is no limit to its exercise. The principle of commutation may at once destroy the equality of rates paid by vessels passing from the different bays, and violate that part of the charter. It is a fraud on the commercial interest of those waters against which the discrimination is made.

(a) Fleckner v. United States Bank, 8 Wheat. 856-7; 17 Mass. 29-30; 1 Greenl. 81.

(b) In The King v. Bury, 4 Barn. & Cres. 361.

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The payment of toll in Philadelphia is a fraud on the attachment laws, both of Delaware and Maryland. The attachment law of Delaware, under which the defendant in error claims redress, was passed sixty-six years ago; was in force at the time of the grant of this company's charter, and its constitutionality has never been questioned. It is very similar to the attachment law of Pennsylvania; and is, in some respects, like the acts in New England against trustees of absconding debtors. It was, I apprehend, never doubted or denied, in Delaware, that it applied to the debtors of all corporations; and under this act, the court below have decided. Another act was passed in 1829, before this canal was opened for navigation, making the "tolls due and to become due," on this canal, liable to attachment; but the court below, as the opinion is understood, expressly declared, in giving judgment on these cases, that this act was declaratory, and gave no new power.

Any and every contract, in fraud or in contravention of law, is void; (a) and so are all contracts which tend to prevent the due course of justice. (b) The payment in Philadelphia, by Shoemaker, was a payment in fraud of the law; and falls precisely within the rule adopted in England in regard to all contracts executed or executory, which are in fraud or contravention of the revenue laws. Smuggling itself cannot be regarded as more odious than the passage of a vessel through a canal, toll free, under a trick to defraud a creditor; and to evade the only laws provided for his security by any states in the Union.

It must be manifest, that, if these attachment laws cannot be enforced on the ground of unconstitutionality, chancery has no power in any state to grant relief. The chancellor of Maryland has lately decided, that he has power to appoint a receiver, to enable him to pay debts; and the subject is now before the chancellor of Delaware too. *If a valid payment of toll can be made in Philadelphia, to evade the attachment law, that payment would be equally valid, as against a receiver appointed by the court of chancery. If the attachment law be held unconstitutional, on account of such a previous payment, surely, there is no redress in equity against it; and the result is inevitable, that this corporation is above the law.

The payment of toll in Philadelphia, is a manifest violation of the by-laws of the company. The fifth regulation to be observed by vessels is: "The tolls shall always be paid at the first lock passed by a vessel; and upon payment thereof, the master shall receive a pass-bill, on which shall be noted the amount of tolls paid, and the precise time of entering." The 21st regulation directs as follows: "the officers and agents of the company are fully authorized by law to enforce obedience to the foregoing regulations; and they are required so to do." These by-laws were made in pursuance of an act of the legislature, supplementary to the charter; which provides, that the by-laws shall not be in contravention of the existing laws of the land. The act was passed in 1832, long after all the attachment laws were in force. Randell, therefore, is protected not only by the general law of the land, but by the very by-laws of this corporation, against

(a) 8 T. R. 454; 1 Dall. 384-6; Angel & Ames 142.

(b) Comyn on Cont. 44.

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payments in Philadelphia ; and it is insisted, that the plaintiff in error is bound by the established rule, that "the restrictions upon the power of the agents or officers of a corporation, contained in the act of incorporation, every person dealing with the company is bound to notice." (a)

No by-law could be made to appoint an officer to collect tolls in Philadelphia. Such a by-law would not only have been in contravention of the attachment laws of the state, but of the charter itself. A by-law may regulate, but cannot alter, the constitution of a corporation. (b) A by-law cannot take away a right, nor impose any unwarrantable restraint on the exercise of it; (c) and a by-law must be reasonable. But a regulation to direct the payment of toll in Philadelphia, would be unreasonable and unjust ; as it would compel every trader south of the canal to go out of his way to Philadelphia, a distance of nearly fifty miles, to pay toll. It would operate as *in-juriously as a discriminating duty against the commerce of Baltimore ; and would be in direct contravention of the spirit of the proviso to the ninth section of the charter, "that the same rate of tolls shall be paid on articles passing from Chesapeake to Delaware, as upon those paid from Delaware to Chesapeake." It would impose on the trader a burden so onerous, as to amount to a new toll or tax, not imposed by the charter ; in contravention of the tenth section also. [*386

The act of 1832, which is a supplement to the charter, and forms part of it, is the authority for these by-laws ; and, as stated, it expressly provides that they shall not be made "in contravention of the constitution or laws of the state." A by-law directing payment elsewhere than on the canal, would not only be in contravention of the laws of the state, but void, as tending to prevent the due course of justice.

The liability of the person having direction of a vessel which has passed the canal, without payment of toll, is fixed by the ninth section of the original act of incorporation ; which, after it provides, that "if any vessel shall pass without paying the said toll, then said collectors may (it is not said shall) seize such vessel, wherever found, and sell the same at auction, for ready money ; which, so far as is necessary, shall be applied towards paying said toll, and all expenses of seizure and sale, and the balance, if any, shall be paid the owner"—then also expressly enacts, that "the person having the direction of such vessel shall be liable for such toll, if the same is not paid by the sale of such vessel as aforesaid." It is clear, that the object was, as the language expresses, that the master should be liable, in all cases where the toll is not paid by the sale of the vessel. If the company decline to sell, which they may or may not do, at their pleasure, in case the vessel pass without payment of toll in the canal, surely the liability of the master of the vessel is fixed. It is in vain to contend, that the sale is an essential pre-requisite to this liability. Such a construction would enable the master to take advantage of his own wrong, and would be an absolute premium for his own fraud ; for then, if he could escape toll free, out of the juris-

(a) Angel & Ames 172 ; Wyman v. Hallowell and Augusta Bank, 14 Mass. 58 ; Salem Bank v. Gloucester Bank, 17 Ibid. 29 ; Wild v. Passamaquoddy Bank, 8 Mason 506.

(b) 1 Kyd 118.

(c) Id. 122.

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diction of the state, with his vessel, he would not be liable. Such a construction renders the master's exemption from liability dependent on the success of his own fraud; and furnishes an inducement to him to commit barratry, by exposing the vessel to loss by seizure and sale. Our construction is, that the remedy against him is cumulative to the right of seizure and sale of the vessel; and were this not the true construction of the charter, of which we think there can be no doubt, *yet by the common law, a master is regarded as the ship's husband; and is liable for pilotage, port-dues, tolls, and all the expenses necessarily incident to the voyage. This common-law remedy is cumulative to that provided by the statute.(a)

It remains for the court to say, with this view of the case, whether there was really any constitutional question necessarily arising on this record. Can a sensible man, could a sensible court, find any such question here, which was decided against the plaintiffs in error? Their counsel alleges, that such a question necessarily arises under the provisions of these charters, which he regards as "a compact or agreement" between the states of Pennsylvania, Delaware and Maryland. But how is it pretended, that the compact has been violated? Did Delaware ever enter into any compact or agreement, that any man should pass the canal toll free, or on payment of toll in Philadelphia? Or did she ever agree, that any man should pass the canal, through her borders, without being liable to that attachment law which was passed by her in 1770; and was in full force when the charter of this company was granted? That act authorizes any plaintiff in a judgment, to attach the goods, chattels, rights, credits or effect of any defendant whatsoever; and compels the debtor or garnishee to answer how much he had in his hands, custody or possession, belonging to the defendant, at the time of the attachment laid, or at any time after and before the return of the writ. It was thought by the court below, and must by this court be seen to be sufficient for the plaintiff's purposes, even if the special act of 1829, which expressly authorizes the attachment of the tolls of this very corporation, had never passed. Under that act of 1770 alone, the court of Delaware, it will be perceived, could not have had the slightest difficulty in passing judgment as they did. They must have considered the act of 1829 as merely declaring and confirming a pre-existing right in every creditor, derived from a law which was in full force thirty years before the state chartered this company. The question, therefore, which, it is pretended, was raised in the state court, was, whether an act in force at the time of the charter, granting a remedy to a creditor, is constitutional? Is that a question? Is it really questionable, whether those who take a charter under a state, thereby subject themselves to the laws of the land, existing at the time, which provide remedies for the administration of justice? *The counsel for the plaintiffs in error may, it is true, put this as a question; but every interrogatory which counsel can put, is not a question within the meaning of the 25th section of the judiciary act.

*It is believed, that a glance at the case will satisfy the court, that there could not possibly have been a real question as to the violation of any compact or agreement by Delaware with any other state. But it would not

(a) Sharp v. Warren, 9 Price 181.

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avail the plaintiffs in error, if there had been. The tenth section of the first article of the constitution provides, that "no state shall, without the consent of congress, enter into any agreement or compact with another state." The judiciary act does not authorize this court to revise a judgment rendered in favor of the defendant in error; even if a constitutional question could have arisen on this clause, which I do not admit. To give this court jurisdiction, the decision in the state court must be against the title, right, privilege or exemption specially set up by either party, under the constitution.

The act of 1832, which is a supplement to the charter, provides, that a master of a vessel, who shall in any manner whatsoever attempt to defraud in the matter of the tolls, shall not only pay the tolls, but a forfeiture besides. Can it be made a question, whether this liability of the master did constitutionally exist in these cases? If not, can it then be made a question, whether the attachment law, which reaches that liability, is constitutional? By the charter, the company is authorized to sue, and made liable "to be sued." This process of foreign attachment is a mode by which it has been sued; and to set up the principle, by sustaining jurisdiction in this case, that a question arising under the constitution is presented by the fact stated, that this company has been thus sued, is to establish the doctrine that every decision in a suit against a corporation, in the states, is liable to be reviewed in this court. In *Bushel v. Commonwealth Insurance Company*, 15 Serg. & Rawle 176, the supreme court of Pennsylvania decided, that the debts due to a foreign corporation were liable to be attached for the payment of a claim against the corporation; and whatever doubts may be entertained as to the application of their attachment laws, which are similar to those of Delaware, to the cases of foreign corporations; no one ever denied or doubted the constitutionality of those laws, as thus construed and applied. Yet while they claim a constitutional jurisdiction over all the corporations in the world, so far as regards the debtors of those *corporations found within their limits; the objection comes from that [*389 state against the constitutionality of the jurisdiction of Delaware over her own domestic corporation; a corporation to which she gave leave to be, and which, without her assent, could never have existed; a corporation more than three-fourths of whose canal lies within her acknowledged limits; and which is at once above the law, and not liable for its debts, if she cannot and does not compel obedience to her laws.

As to the resolution mentioned in the cases stated, passed three days after the original judgment of the plaintiff below against the canal company, and which directs tolls to be collected in Maryland; it was, manifestly, a meditated fraud. Any other by-law passed to evade the jurisdiction of Delaware, would be equally a fraud on the law. Even were such a by-law held good, however, it would not prevent the courts of Delaware from compelling payment to the company's creditors, claiming strict justice at her hands. Her attachment, laid in the hands of a master of a vessel, is a discharge from all tolls due or to become due from him, at and after the service of the writ, and until the return of it. A Maryland attachment furnishes a good defence for a garnishee in New York; and a Delaware attachment is an equally good defence for a garnishee in Maryland. He who passes the Maryland lock in the canal, after being served with a Dela-

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ware attachment, and before its return, is protected by the writ, according to the course of all the decisions regulating the law of judicial transfer in this country. The writ protects the master, as a payment in the canal, in the eye of the law ; and were any other construction adopted, neither Maryland nor Delaware could give redress to any creditor of this canal company ; because, as soon as a judgment could be recovered in one of those states, the company might thus defeat its jurisdiction, by removing all the toll-houses into the other.

The doctrine laid down in *Miller v. Nicholls*, 4 Wheat. 311, 315, that "it would have been sufficient to give this court jurisdiction of the cause, if the record should show that an act of congress was applicable to the case," is inaccurate, as understood by the other side. It must appear from the record, that some act of congress, treaty or clause in the constitution, relied on to give jurisdiction, was not merely applicable, but necessarily applied : and that the court below could not have decided as they did, without considering and deciding on it. Such we apprehend to be the true doctrine, as gathered from all the cases.

*390] *Sergeant, in reply to Clayton's argument, as introducing new matter.—The concluding counsel for the defendant in error has said, that the case was decided in Delaware in his favor, on the ground of fraud. This is not apparent on the facts agreed upon. Nothing of an allegation of fraud can be deduced from those facts. What is the fact, from the evidence ? It is said, that the resolution of the board of directors to remove the collection of tolls out of Delaware, was a fraud on the creditors of the company ; and on the rights of those who were in any manner connected with the use of the canal. This argument proceeds on the thing to be proved. Suppose, the law under which the attachment was laid, was unconstitutional, and the question is, whether it is a fraud to violate a law which is unconstitutional—the proceedings under such a law are void acts, and no fraud can be alleged out of such a case. The argument of the counsel for the defendant in error involves the question which is presented by the record ; that the attachment law of Delaware, as it interferes with the rights of the company, is unconstitutional. This is affirming the jurisdiction of this court in the case.

Another view of the matter. How does it appear, that this is a fraud on the part of the company, and that they have exposed themselves to the charge of fraud on the state of Delaware ? The charter gives the company the right to demand the toll on the canal ; but the place for its payment depends upon the resolution of the directors. The power to enforce the payment of tolls is made, by the construction given by the counsel for the defendant, applicable to the power to demand tolls on the canal ; and it is said, that although a person may have willingly paid the toll, before he entered the canal, this shall not be done, because of the authority given to demand the payment after the vessel has entered it. This construction of the charter is denied. The voluntary payment of the tolls to the company, or to its agents, anywhere, supersedes the necessity of any demand ; and the provision of the charter on which the defendant relies, has no application to such a case. Had the company demanded the toll, before the vessel entered the canal, and had this demand, made in Philadelphia, been followed by measures to compel its payment, the case might be, although it is not admit-

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ted that it would be, different. It is apparent, then, that on the constitutional *validity of the attachment law thus applied, the judgment of [*391 the court of Delaware depends.

There is no application to this case of the decisions of the courts of Pennsylvania, that a foreign corporation is liable to attachment. The case here is, where the law of the state makes its own corporation so liable.

This court will not readily entertain a motion to dismiss a case for want of jurisdiction, preliminary to a full hearing of it; for if it shall, on the full examination of it, and after full argument, be found that the court has no jurisdiction, the court will act accordingly. But if, without such a hearing, the dismissal is made, the party may sustain much injury, without any remedy or relief. The case of *Miller v. Nichols* fully maintains the objection made to the dismissal of this case. The court there decided, that it is sufficient to give it jurisdiction, if it appeared, that an act of congress was applicable to the case.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the superior court of the state of Delaware, to revise the judgment of the court of errors and appeals of the said state, the record of which judgment had been remanded to the superior court of the same state.

A motion has been made to dismiss the suit, for want of jurisdiction, upon the ground, that there is nothing apparent upon the record, to bring the case within the revising power of this court, under the 25th section of the judiciary act of 1789, ch. 20. That section confers appellate jurisdiction on this court from final judgments and decrees in any suit in the highest court of law or equity of a state in which a decision in the suit could be had; in three classes of cases: first, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity: secondly, where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity: thirdly, where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute *or commission. The section then goes [*392 on to provide, that no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears upon the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions or authorities in dispute.

In the interpretation of this section of the act of 1789, it has been uniformly held, that to give this court appellate jurisdiction, two things should have occurred and be apparent in the record: first, that some one of the questions stated in the section did arise in the court below; and secondly, that a decision was actually made thereon, by the same court, in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show, that such a question might have occurred, or such a decision might have been made, in the court

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below. It must be demonstrable, that they did exist, and were made. The principal, perhaps, the only important, difficulty, which has ever been felt by the court, has been in ascertaining in particular cases, whether these matters (the question and decision) were apparent on the record. And here the doctrine of the court has been, that it is not indispensable, that it should appear on the record, *in totidem verbis*, or by direct and positive statement, that the question was made and the decision given by the court below on the very point ; but that it is sufficient, if it be clear, from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question, as indispensable to that judgment.

Although this has been the course of the decisions in this court, as to the extent and exercise of its appellate jurisdiction over the judgments and decrees of state courts ; yet it is apparent, from the arguments on the present occasion, as well as from those which have been addressed to us on several other late occasions, that a different impression exists at the bar, and that it has been supposed, that a much wider latitude of interpretation of the 25th section of the judiciary act of 1789 has been adopted by the court. To correct, at least so far as in us lies, this mistaken notion, we shall now proceed to review the various decisions, which have heretofore been made on this subject.

The earliest case is *Owings v. Norwood's Lessee*, 5 Cranch 344. *In [393] that case, it clearly appeared, that the construction of a treaty was before the state court, and that it was decided, that the right of the party was not protected by the treaty. This court affirmed the decision of the state court. The next case was *Smith v. State of Maryland*, 6 Cranch 286. In that case, it was contended, that the court had no jurisdiction, because the cause turned exclusively upon the confiscation laws of Maryland ; and that no question relative to the construction of the treaty of peace, did or could occur. But upon the facts stated on the record, the only title asserted by the original plaintiffs was founded on the confiscation acts of Maryland ; and the only title set up by the original defendant was for a British alien, protected by the treaty of peace. If that title was so protected, then the plaintiffs were not entitled to the relief sought by the bill ; if otherwise, then the plaintiffs were entitled to a decree. The state court decided, that the plaintiffs were so entitled ; and therefore, necessarily decided against the treaty as a protection. The jurisdiction was maintained by this court, upon this posture of the facts ; and the decision of the state court was afterwards affirmed. But the court said, that in order to decide upon the main question, it was indispensable to ascertain, what the nature of the title was, to which the treaty was sought to be applied.

The next case was *Martin v. Hunter's Lessee*, 1 Wheat. 305, 355. There, the original case came before the court upon an agreed statement of facts, upon which the state court gave judgment against the original defendant. That judgment was, upon a writ of error, reversed by this court ; and when the cause came afterwards before this court, upon a second writ of error, the objection was again, that the original case was not within the 25th section of the judiciary act. Upon this occasion, the court, after stating the material facts in the agreed case, said : "It is apparent, from

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this summary explanation, that the title, thus set up by the plaintiff, might be open to other objections ; but the title of the defendant in error (against which the state court had decided) was perfect and complete, if it was protected by the treaty of 1783. If, therefore, this court had authority to examine into the whole record, and to decide upon the legal validity of the title of the defendant, as well as its application to the treaty of peace, it would be a case within the express purview of the 25th section of the act ; for there was nothing in the record upon which the court below could have decided, but upon the title, as connected with the treaty. And if the *title was otherwise good, its sufficiency must have depended altogether upon its protection under the treaty. Under such circumstances, it was strictly a suit, where was drawn in question the construction of a treaty, and the decision was against the title specially set up or claimed by the defendants. It would then fall within the very terms of the act." [*394]

The next case was *Inglee v. Coolidge*, 2 Wheat. 363, where a motion was made to dismiss the writ of error, upon the ground, that there was nothing apparent upon the record, which brought the case within the appellate jurisdiction of this court, under the 25th section of the act of 1789. The court were of this opinion, and accordingly dismissed the writ of error.

The next case was *Miller v. Nicholls*, 4 Wheat. 311, 315. Mr. Chief Justice MARSHALL, in delivering the opinion of the court, said : "It does not appear from the record, that either the constitutionality of the law of Pennsylvania, or any act of congress was drawn in question. It would not be required, that the record should, in terms, state a misconstruction of an act of congress, or that an act of congress was drawn in question. It would have been sufficient to give this court jurisdiction of the cause, that the record should show, that an act of congress was applicable to the case. This is not shown by the record." The language used in this last sentence, has been often cited, as if it importred, that if an act of congress was shown to be applicable to the case, although it was not in fact applied by the decision of the state court, it would sustain the appellate jurisdiction of this court. That was certainly not the understanding of the chief justice, or of the court. The case of *Miller v. Nicholls* was decided in the state court upon an agreed statement of facts ; by which it appeared, that Nicholls was a debtor both to the United States and to the state of Pennsylvania ; and the question raised was, whether the United States, or the state of Pennsylvania, was entitled to certain money of Nicholls, then in court, as the creditor of Nicholls. The United States claimed it, in virtue of the priority given by the act of the 3d of March 1797, ch. 74. But it did not appear in the statement of facts, that Nicholls was then in a state of insolvency ; and if he was not, then the priority of the United States did not attach ; or in other words, the act of congress was not applicable to it. It is to this state of the facts, that the language of the chief justice was addressed. He added, "had the fact of insolvency appeared upon the record, that would have enabled *this court to revise the judgment of the supreme court of Pennsylvania." And why ? it may be asked. Because, upon the [*395] statement of facts, the state conrt must, under these circumstances, have misconstrued the act of congress, or disregarded it ; for otherwise they would not have given the judgment, which was sought to be revised.

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That this is the true explanation of this case, does not admit of controversy. In the very next case, *Williams v. Norris*, 12 Wheat. 117, 124, where this very expression in *Miller v. Nicholls*, was relied on in argument, to establish the position, that it is sufficient to give the court jurisdiction, that the record should show that an act of congress was applicable to the case, the chief justice gave the very explanation of it, which is now insisted on ; and he added, "had the record shown, that this was a case of insolvency, so that the act of congress applied to it, that act must have been misconstrued, or its obligation denied, when the court decreed the money to Pennsylvania ; and the court were of opinion, that the act could not be evaded, by the omission to refer to it in the judgment, or to spread it on the record." In the case of *Williams v. Norris*, this court dismissed the writ of error, because it was not stated on the record, that the constitutionality of the act of Tennessee, set up in that case, was drawn in question. In *Fisher v. Cockerell*, 5 Pet. 258, the case of *Miller v. Nicholls* was again cited, and commented on by the chief justice, and the same explanation of the decision was recognised and enforced ; and because the facts did not appear on the record, which would bring the case within the terms of the 25th section of the act of 1789, the writ of error, in *Fisher v. Cockerell*, was also dismissed.

But, to proceed with the other cases in their chronological order : the next case was *Hickie v. Starke*, 1 Pet. 98. There, a motion was made to dismiss the writ of error for the want of jurisdiction. Mr. Chief Justice MARSHALL, in delivering the opinion of the court dismissing the writ of error, said : "In the construction of that section (the 25th), the court has never required, that the treaty or act of congress, under which the party claims, who brings the final judgment of a state court into review before this court, should have been pleaded specially or spread on the record. But it has always been deemed essential to the exercise of jurisdiction in such a case, that the record should show a complete title under the *treaty *396] or act of congress, and that the judgment of the court is in violation of that treaty."

The next case was *Wilson v. Blackbird Creek Marsh Company*, 2 Pet. 245, 250. In that case, the chief justice, in delivering the opinion of the court sustaining the jurisdiction, said : "We think it impossible to doubt, that the constitutionality of the act (of Delaware) was the question, and the only question, which could have been discussed in the state court. That question must have been discussed and decided. This court has repeatedly decided in favor of its jurisdiction in such a case. *Martin v. Hunter's Lessee*, *Miller v. Nicholls*, and *Williams v. Norris*, are expressly in point. They establish, so far as precedents can establish anything, that it is not necessary to state in terms, on the record, that the constitution or a law of the United States was drawn in question. It is sufficient, to bring the case within the provisions of the 25th section of the judiciary act, if the record shows, that the constitution or a law or a treaty of the United States, must have been misconstrued, or the decision could not have been made ; or, as in this case, that the constitutionality of a state law was questioned, and the decision was in favor of the party claiming under such law."

The next case was *Satterlee v. Mathewson*, 2 Pet. 380, 410, where Mr. Justice WASHINGTON, in delivering the opinion of the court, sustaining the

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jurisdiction, after citing prior cases, said : "If it sufficiently appear from the record itself, that the repugnancy of a statute of a state to the constitution of the United States was drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause, under the section of the act referred to, although the record should not in terms state a misconstruction of the constitution of the United States, or that the repugnancy of the statute of the state to any part of that constitution was drawn into question." But he immediately adds, as explanatory of his remarks, and to correct their generality : "Now, it is manifest from this record, not only that the constitutionality of the statute of the 8th of April 1826, was drawn into question, and was applicable to the case ; but that it was so applied by the judge, and formed the basis of his opinion to the jury, that they should find in favor of the plaintiff, if in other respects she was entitled to a verdict. It is equally manifest, that the right of the plaintiff to recover in that action depended on that statute."

The next case was *Harris v. Dennie*, 3 Pet. 292, 302, *where the court, in answer to the objection of a want of jurisdiction, because it did not appear upon the record, that any question within the 25th section arose in the state court, upon the special verdict, said : "It has been often decided in this court, that it is not necessary that it should appear, in terms, upon the record, that any such question was made. It is sufficient, if, from the facts stated, such a question must have arisen, and the judgment of the state court would not have been, what it is, if there had not been a misconstruction of some act of congress, or a decision against the validity of the right, title, privilege or exemption set up under it."

The next case was *Craig v. State of Missouri*, 4 Pet. 410, in which Mr. Chief Justice MARSHALL, in affirming the jurisdiction of the court, said, "To give jurisdiction to this court, it must appear in the record : 1. That the validity of a statute of the state of Missouri was drawn in question, on the ground of its being repugnant to the constitution of the United States. 2. That the decision was in favor of its validity." And again, "there has been a perfect uniformity in the construction given by this court to the 25th section of the judiciary act. That construction is, that it is not necessary to state, in terms, in the record, that the constitution, or a treaty or law of the United States, has been drawn in question, or the validity of a state law, on the ground of its repugnance to the constitution. It is sufficient, if the record shows, that the constitution, or a treaty or law of the United States must have been construed, or that the constitutionality of a state law must have been questioned, and the decision has been in favor of the party claiming under such law."

In *Fisher v. Cockerell*, 5 Pet. 255, the cases of *Harris v. Dennie*, and *Craig v. State of Missouri*, were reviewed, and the doctrine stated therein confirmed ; and Mr. Chief Justice MARSHALL, after that review, added : "We say, with confidence, that this court has never taken jurisdiction, unless the case, as stated in the record, was brought within the provisions of the 25th section of the judiciary act."

In *Davis v. Packard*, 6 Pet. 41, 48, Mr. Justice THOMSON said : "It has also been settled, that in order to give jurisdiction to this court, under the 25th section of the judiciary act, it is not necessary that the record

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should state, in terms, that an act of congress was, in point of fact, drawn in question. It is sufficient, if it appears from the record, that an act of congress was applicable to the *case, and was misconstrued ; or the decision in the state court was against the privilege or exemption specially set up under such statute." In the *Mayor of the city of New Orleans v. De Armas*, 9 Pet. 234, where the suit was dismissed for want of jurisdiction, the chief justice, in delivering the opinion of the court, said : " We can inquire only, whether the record shows, that the constitution, or a treaty or a law of the United States, has been violated by the decision of the state court. To sustain the jurisdiction of the court in the case now under consideration, it must be shown, that the title set up by the city of New Orleans is protected by the treaty ceding Louisiana to the United States, or by some act of congress applicable to that title."

These are all the cases, it is believed, in which the construction of the 25th section of the judiciary act has been made a matter of controversy ; and they extend over a period of more than twenty-five years. They exhibit a uniformity of interpretation of that section, which has never been broken in upon. They establish, so far as a course of decision can establish, the propositions already stated in the early part of this opinion. The period seems now to have arrived, in which the court should, upon a full review of all the cases, with a view to close, if possible, all future controversy on the point, re-affirm the interpretation which they have constantly maintained. It is, that to bring a case within the 25th section of the judiciary act, it must appear on the face of the record : 1st. That some one of the questions stated in that section did arise in the state court. 2d. That the question was decided by the state court, as required in the same section. 3d. That it is not necessary, that the question should appear on the record to have been raised, and the decision made in direct and positive terms, *ipsoissimis verbis*; but that it is sufficient, if it appears, by clear and necessary intentment, that the question must have been raised, and must have been decided, in order to have induced the judgment. 4th. That it is not sufficient, to show, that a question might have arisen, or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the state court to the case.

If, with these principles in view, we examine the record before us, it is very clear, that this court has no appellate jurisdiction. No question appears to be raised, or decision made by the state court, within the purview of the 25th section. The statement of *facts, upon which the judgment against the garnishee (the plaintiff in error) was given, presents no question as to the constitutionality of the laws of Delaware, relative to garnissees ; and no right is set up by the Chesapeake and Delaware Canal Company, under their charters, which has been infringed, in violation of the constitution of the United States. So far as we can perceive from the record, the judgment had no reference to any constitutional question whatsoever ; but it proceeded upon general principles of law, applicable to cases of garnishment. If, indeed, we were compelled to draw any conclusion, it would be, that the judgment proceeded upon the ground stated at the bar, that the payment of the tolls for which the plaintiff was held liable as garnishee, was a meditated fraud upon the garnishee laws of Delaware, and a violation of the charters and by-laws of the company. But it is unneces-

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sary for us to draw any such conclusion ; since there is a total absence from the record of any question and decision, which would give this court jurisdiction. The judgment of the court is, that the suit must be dismissed for want of jurisdiction.

Writ of error dismissed.

*JOHN HAGAN, Plaintiff in error, v. CHARLES F. LUCAS. [*400

State records.—Conflict of jurisdiction.—Sheriff's interpleader.

A judgment was obtained in a state court of Alabama, against B. and M., and the sheriff, under an execution issued upon the judgment, levied upon certain slaves, as the property of the defendants ; they were claimed by L., and were delivered to him, he having given a bond to the sheriff to try the title, and for the forthcoming of the slaves, according to the laws of that state ; H. had obtained a judgment against B. and M., in the district court of the United States for the district of Alabama, acting as a circuit court ; under an execution issued on this judgment, the marshal levied on the slaves, and they were claimed by L. ; the marshal returned, that they were so claimed, upon which an issue was formed in the district court, to try the title of L. to the slaves. L. gave in evidence the record of the judgment in the state court against B. and M., and the proceedings under it ; certificates of the records were given on the 4th of December 1834, and they showed, that the suit, respecting the right of property in the slaves, had been continued at March term 1834, but did not show whether any further proceeding in the case had taken place, at the preceding spring term of the state court. The district court instructed the jury, that the records of the state court were legal evidence, by which they might infer the proceedings were still depending and undetermined in the state court : Held, that the instruction was correct.

Had the property remained in the possession of the sheriff, under the first levy, it is clear, the marshal could not have taken it in execution, for the property could not be subject to two jurisdictions, at the same time ; the first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other.

Under the state jurisdiction, a sheriff, having execution in his hands, may levy on the same goods ; and where there is no priority, on the sale of the goods, the proceeds should be applied in proportion to the sums named in the executions ; and where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain, after satisfying the first levy, by the order of the court.

But the same rule does not govern, where the executions, as in the present case, issue from different jurisdictions ; the marshal may apply moneys, collected under several executions, the same as the sheriff ; but this cannot be done as between the marshal and the sheriff.

A most injurious conflict of jurisdiction would be likely often to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other ; the marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution, at the same time, by the marshal and the sheriff, does this special property vest in the one or the other, or both of them ? No such case can exist : property once levied on, remains in the custody of the law, and it is not liable to be taken by another execution, in the hands of a different officer ; and especially, by an officer acting under a different jurisdiction.¹

¹ So, the federal courts have no jurisdiction to restrain a sheriff from selling property levied upon under state process. *Ruggles v. Simonton*, 8 Biss. 825. As, from selling the goods of A. under an execution against B. *Daly v. Sauvinet*, 1 Woods 175. Neither can the state tribunals interfere in any way, by injunction or otherwise, with the appropriate process of the federal courts for the collection of their judgments. *United States v. Lee County*, 2 Biss. 77 ; *Lansing v. County Treasurer*, 1 Dill. 522.

A sheriff has no right to disturb, or in any way interfere with, the possession of property legally in the custody of a United States marshal. *Crane v. McCoy*, 1 Bond 422. So, where personal property is levied on by the marshal, by virtue of mesne process out of a federal court, it cannot be taken out of his possession by a sheriff, under a replevin from a state court. *Freeman v. Howe*, 24 How. 450 ; *Buck v. Colbatch*, 8 Wall. 335. And see *Covell v. Heyman*, 111 U. S. 176, 181.

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*On the giving of the bond, the property is placed in the possession of the claimant; his custody is substituted for the custody of the sheriff; the property is not withdrawn from the custody of law; in the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of other processses, as it would have been in the hands of the sheriff.¹

ERROR to the District Court of the United States for the Southern District of Alabama.

MCLEAN, Justice, delivered the opinion of the court.—This writ of error is prosecuted by the plaintiffs to reverse a judgment of the district court, vested with the powers of a circuit court, for the southern district of Alabama. The record in the district court states, that on the 14th of December 1833, a judgment was entered in that court, in favor of John Hagan, against William D. Bynum and Alexander McDade, for the sum of \$2972.58, besides costs; and that an execution was issued against the goods and chattels, lands and tenements of the defendants, which, on the 19th of February 1834, was levied on several slaves, that were claimed by Charles F. Lucas, who gave bond to try the right of property. At the time of the levy, the slaves were in the possession of the claimant. And the question as to the right of property being brought before the court, under a statute of the state; the claimant, Lucas, as stated in the bill of exceptions, gave in evidence three records, certified by the clerk of the circuit court of Montgomery county, Alabama, of three judgments rendered in that court, at September term, for various amounts, against the above defendants, Bynum

¹ That goods taken in execution, and ordered to be delivered to an adverse claimant, on giving bond to the sheriff for their forthcoming, in case of failure to substantiate his claim, are in the custody of the law, and cannot be taken in execution by another judgment-creditor of the original defendant, would seem to be well settled; and would not be doubted, were it not for a case decided in one of the inferior courts of Pennsylvania, upon what appears to have been a very superficial examination of the question. Battersby v. Hanbest, 8 W. N. C. 94. In that case, the judge, whilst admitting that goods, so circumstanced, cannot be levied upon by an execution issued out of another jurisdiction, decides, that they may be a second time so levied on, by the same officer, under an execution which came to his hands, subsequently to the delivery thereof to claimant, on his giving bond to establish his title to the same. The judge says, there is no case directly in point; but in this he is mistaken. The precise point was determined in Alabama, under the laws of which state, the case of Hagan v. Lucas was decided, in Lemore v. Benbow, 19 Ala. 76. And in Acker v. White, 25 Wend. 614, Chief Justice NELSON says, that until the claim under first levy is disposed of, a second levy cannot be made. So also says Judge CLAYTON, in First National

Bank v. Allen, 1 Delaware County Rep. 279. In what predicament would the sureties in the claimant's bond be placed, if the law should take the goods out of the hands of their principal, and thus render the performance by his bond impossible? Besides, it is not incumbent on the claimant to give bond; he may permit the goods to be sold, and the proceeds paid into court, to await the decision upon his claim. Barnum's Universal Exposition Co. v. O'Brien, 7 W. N. C. 82. And in such case, the fund certainly could not be reached by another execution-creditor, though his process might be directed to the same officer. Battersby v. Hanbest cannot, therefore, be good law. The giving of an interpleader bond does not discharge the lien of the execution; on the determination of the issue in favor of the execution-creditor, he may issue a *venditioni exposas* for the sale of the goods, if they can be found. Bain v. Lyle, 68 Penn. St. 60. But of this remedy also, he would be deprived, if the goods could, in the meantime, be sold under an intermediate writ, and the sureties in the claimant's bond should prove insufficient. It is true, the court might impound the fund; but where is the authority for this? The bond has taken the place of the goods, and the court has no jurisdiction over them, or their proceeds, so far as the first execution-creditor is concerned.

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and McDade; and upon which judgments, it was proved, executions had regularly issued to the sheriff of Montgomery county, which, on the 10th of October 1833, were levied on the same slaves taken in execution by the marshal, as above stated ; and that the claimant filed his affidavit, on the 25th of November 1833, in the mode prescribed by the statute ; setting forth that the slaves were not the property of the defendants in the execution, but were his property, and gave bond and security to the sheriff, as required by the statute, for the forthcoming of said property, if it should be found subject to said executions ; and for all costs and charges for the delay, &c. On the giving of this bond, the slaves were delivered to the possession of the claimant ; and these proceedings were returned by the sheriff to the circuit court of Montgomery county. And the records *showed, that at [*402 the March and November terms in 1834, the proceedings for the trial of the right of property were continued. The record was certified on the 4th of December 1834.

Upon this evidence, the court instructed the jury, that if they believed, that previously to the levy of the marshal, the slaves had been levied on by the sheriff of Montgomery county, and that they had been delivered to Lucas, on his making oath and giving bond, as required by the statute ; and if they believed, that the proceedings on said claim were still pending and undetermined in the circuit court ; that the property was, in the opinion of the court, considered as in the custody of the law, and consequently, not subject to be levied on by the marshal.

And the counsel for the defendant objected to the records from the circuit court of Montgomery, as showing the pendency of the suit in that court, respecting the right of property ; as a term of the court had intervened between the certification of the record and the time of using it in evidence. But the court overruled the objection, saying, the pendency of the suit was a matter of fact for the jury to determine ; and that they might infer, from the proof before them, that the suit was still pending ; which presumption might be rebutted by the plaintiff in the execution, &c.

The statute of Alabama, under which this proceeding took place, was passed on the 24th of December 1812 ; and provides, that where any sheriff shall levy execution on property, claimed by any person not a party to such execution, such person may make oath to such property ; on which the sale shall be postponed by the sheriff, until the next term of the court ; and the court is required to make up an issue to try the right of property, &c., and the claimant is required to give bond, conditioned to pay the plaintiff all damages which the jury, on the trial of the right of property, may assess against him, &c.; and it is made the duty of the sheriff to return the property levied upon to the person out of whose possession it was taken, upon such person entering into bond, with security, to the plaintiff in execution, in double the amount of the debt and costs, conditioned for the delivery of the property to the sheriff, whenever the claim of the property so taken shall be determined by the court ; and on failure to deliver the property, the bond, on being returned into the clerk's office, is to have the effect of a judgment.

The principal question in this case is, whether the slaves referred to were liable to be taken in execution, by the marshal, under the [*403 circumstances of the case. Had the property remained in the possession of

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the sheriff, under the first levy, it is clear, the marshal could not have taken it in execution; for the property could not be subject to two jurisdictions at the same time. The first levy, whether it were made under the federal or state authority, withdraws the property from the reach of the process of the other. Under the state jurisdiction, a sheriff having execution in his hands, may levy on the same goods; and where there is no priority on the sale of the goods, the proceeds should be applied in proportion to the sums named in the executions. And where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain, after satisfying the first levy, by the order of the court. But the same rule does not govern, where the executions, as in the present case, issue from different jurisdictions. The marshal may apply moneys, collected under several executions, the same as the sheriff; but this cannot be done as between the marshal and the sheriff.¹

A most injurious conflict of jurisdiction would be likely, often, to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other. The marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution, at the same time, by the marshal and the sheriff, does this special property vest in the one, or the other, or both of them? No such case can exist; property once levied on, remains in the custody of the law, and it is not liable to be taken by another execution, in the hands of a different officer; and especially, by an officer acting under a different jurisdiction.

But it is insisted in this case, that the bond is substituted for the property; and consequently, that the property is released from the levy. The law provides, that the property shall be delivered into the possession of the claimant, on his giving bond and security in double the amount of the debt and costs, that he will return it to the sheriff, if it shall be found subject to the execution. *Is there no lien on property thus situated, either under the execution or the bond? That this bond is not in the nature of a bond given to prosecute a writ of error, or on an appeal, is clear. The condition is, that the property shall be returned to the sheriff, if the right shall be adjudged against the claimant. Now, it would seem, that this bond cannot be considered as a substitute for the property, as the condition requires its return to the sheriff. The object of the legislature in requiring this bond, was, to insure the safe-keeping and faithful return of the property, to the sheriff, should its return be required. If, then, the property is required by the statute, and the condition of the bond, to be delivered to the sheriff on the contingency stated, can it be liable to be taken and sold on execution?

If the property be liable to execution, a levy must always produce a forfeiture of the condition of the bond. For a levy takes the property out of the possession of the claimant, and renders the performance of his bond impossible. Can a result so repugnant to equity and propriety as this, be sanctioned? Is the law so inconsistent, as to authorize the means by which the discharge of a legal obligation is defeated, and at the same time, exact a penalty for the failure. This would, indeed, be a reproach to the law and

¹ See *Bayard v. Bayard*, 5 Clark (Pa.) 261; and *Ascarati v. Fitzsimmons*, 3 W. C. C. 184.

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to justice. The maxim of the law is, that it injures no man, and can never produce injustice. On the giving of the bond, the property is placed in the possession of the claimant. His custody is substituted for the custody of the sheriff. The property is not withdrawn from the custody of the law. In the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of the other processes, as it would have been in the hands of the sheriff.

In Holt 643, and 1 Show. 174, it was resolved by HOLT, Chief Justice, that goods being once seized and in custody of the law, they could not be seized again, by the same, or any other, sheriff; nor can the sheriff take goods which have been distrained, pawned or gaged for debt (4 Bac. Ab. 389); nor goods before seized on execution, unless the first execution was fraudulent, or the goods were not legally seized under it. In Woodfall's Tenant's Law 389, it is said : By the seizure under the execution, the goods were in the custody of the law, and were not, therefore, distrainable; for it is repugnant, *ex vi termini*, that it should be lawful to take the goods out of the custody of the law; *and that cannot be a pledge, which can- [*405 not be reduced into actual possession.

In 3 Munf. 417, the court decided that the lien, by virtue of a writ of *fieri facias*, upon the property of the debtor, is not released by his giving a forthcoming bond, but continues, until such bond is forfeited. In that case, the defendant's property having been levied on by an execution in the hands of the sheriff, was suffered to remain in his possession, on his giving a forthcoming bond for the delivery of the goods on the day of sale; but before the day of sale, the defendant delivered the goods in satisfaction of another execution, and the question was made, whether the forthcoming bond released the lien of the first execution. In his opinion, Judge ROANE draws the following distinctions between a forthcoming bond, and what is called a replevy bond, under the statute of Virginia. 1. A replevy bond, under the act, operated a release of the property. 2. Because the surety therein is to be approved by the creditor; a circumstance very material in a bond considered as a substitute for an execution, and wanting as to the sureties upon forthcoming bonds. 3. Because a replevy bond obtained the force of a judgment, by the mere giving thereof; though its execution was suspended, till the expiration of three months, and did not owe its obligation, as a judgment, to the breach of the condition thereof, as is the case of forthcoming bonds.

The bond given by the claimant Lucas, bears a strong analogy to a forthcoming bond. By the latter, the goods were to be delivered to the sheriff, on the day of sale; by the former, the goods were to be delivered to the sheriff, so soon as the right shall be determined against the claimant. In neither bond, is the plaintiff in the execution consulted, as is done in the replevy bond, as to the sufficiency of the surety; nor do either of these bonds, like the replevy bond, operate as a judgment, until a breach of the condition. In fact, the bond under the Alabama statute is substantially a forthcoming bond.

In a late case, the supreme court of Alabama decided the same question which is made on this bond, on a bond given for the delivery of property under the attachment laws of that state. They decided, that the giving of

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the bond did not release the goods from the lien of the attachment.¹ A contrary decision had been given by the court, in a case similar; but on further examination and more mature reflection, two of the three judges made the above decision. This adjudication being made on the construction of a statutory *proceeding, and by the supreme court of the state, forms *406] a rule for the decision of this court.

We think, that part of the charge to the jury by the district court, which respected the pendency of the suit in the state court, and which was excepted to, was substantially correct: and we are of opinion, that on principle and authority, and also under the construction given to the statute, by the supreme court of the state, the judgment of the district court must be affirmed.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the southern district of Alabama, and was argued by counsel: On consideration whereof, it is adjudged and ordered by this court, that the judgment of the said district court in this cause be and the same is hereby affirmed, with costs.

*407] *DAVID B. MACOMB, HENRY W. BACKENRIDGE and WILLIAM B. NUTTALL v. MARCUS A. ARMSTEAD, Administrator of JOHN G. ARMSTEAD.

Practice.

The plaintiff in error had lodged with the clerk of the court, a transcript of the record of the cause; but had failed to have the transcript filed, or the cause docketed, in pursuance of the rules of the court. The court refused to docket or dismiss the case, on the motion of the counsel of the defendant in error, who asked the court to dispense with the certificate required by the 19th rule of the court, and to substitute the transcript lodged with the clerk of the court by the plaintiff in error, as and for the said certificate.

The defendant in error, to entitle himself to the benefit of the rule, must produce the certificate of the clerk, as required by the rule.

ERROR to the Court of Appeals for the Territory of Florida.

Mason, of counsel for the defendant in error, having stated to the court, that the plaintiffs in error, in this cause, had lodged with the clerk of this court a transcript of the record in the cause, but had failed to have said transcript filed, or the cause docketed, in pursuance of the rules of this court; moved the court to docket and dismiss this writ of error, under the 19th rule of this court, of February term 1806, and to dispense with the certificate required by said rule, but to substitute the transcript for and as a certificate.

On consideration, the Court was of opinion, that the defendant in error, to entitle himself to the benefit of the rule, must produce the certificate of the clerk, as required by the rule. Whereupon, it was ordered by the court, that the said motion be and the same was overruled.

Motion overruled.

¹ See Doremus v. Walker, 8 Ala. 104.

***SAMUEL PACKER and others v. HENRY NIXON, Administrator of MATTHIAS ASPDEN, deceased.**

Certificate of division.

Questions respecting the practice of the circuit court in equity causes, which depend upon the exercise of the sound discretion of the court, in the application of the rules which regulate the course of equity proceedings, to the circumstances of such particular case, are not questions which can be certified on a division of opinion of the judges of the circuit court, under the act of 1802, ch. 32.

CERTIFICATE of Division from the Circuit Court for the Eastern District of Pennsylvania.

At January term 1835, this case was before the court (9 Pet. 483) on an appeal ; and the decree of the circuit court was reversed, without a decision on the merits, for the purpose of amending the proceedings, by entering an allegation of the domicil of the testator, the construction of whose will was the subject of controversy ; and introducing proof in relation thereto ; and also to allow the introduction of other parties claiming the estate of the testator. After the coming in of the mandate of this court, certain other proceedings took place in the circuit court ; an amended bill was filed by the original complainant, containing the allegation of domicil, which was considered necessary by the supreme court ; and numerous petitions, to be allowed to become parties, were presented by other persons. Among these, Janet Jones and Mary Poole, filed their bill, claiming the whole estate of the testator, as heirs-at-law and next of kin of John Aspden, of London ; whom they averred to have been heir-at-law of the testator, and as such entitled to his whole estate, real and personal, under his will. John A. Brown also filed a bill, claiming the whole personal estate of the testator, as the administrator of John Aspden, of London. He took out letters of administration in Pennsylvania, upon the estate of John Aspden, as the attorney of the children of John Aspden, of London.

Henry Nixon, the defendant, filed an answer to all these bills ; and subsequently, under leave to amend his answer and plead, filed an amended answer, with certain pleas thereunto annexed. *In these pleas, he [^{*409} averred certain proceedings to have taken place in the court of chancery and court of exchequer in England ; in which, he alleged, *inter alia*, that Janet Jones and Mary Poole instituted those suits, for the same subject-matter, and that John A. Brown's bill was in the same right, and also for the same matter. No affidavit was made to these pleas, by the executor, as they were filed at the instance of the counsel of one of the parties, in the execution of a purpose to allow all matters which were claimed as important to the full consideration and proceedings in the case, to be brought forward and exhibited for the consideration of the court.

On the 14th of November 1835, the counsel for Mrs. Poole and Mrs. Jones, and the counsel for John A. Brown, administrator of John Aspden, of London, moved for a rule to show cause why the pleas in bar should not be stricken off, as containing averments of matter *in pais*, not verified by affidavit. On the same day, the counsel for John Aspden, of Lancashire, moved for a rule on Mrs. Poole and Mrs. Jones, and on John A. Brown, administrator to John Aspden, of London, to show cause why they should

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not be required to elect on which bill or petition they would proceed ; and to abide by the one elected and abandon the other.

On the 6th of January 1836, on the hearing of these motions, the following questions occurred, upon which the opinions of the judges were opposed : 1st. Whether it is necessary that an affidavit be made to the pleas in bar to the petition of John A. Brown, or to any part thereof ; and if so, to what part ? 2d. Whether the rule moved for by Ingersoll and Sergeant, on the 14th day of November 1835, in the following words : " Mr. Sergeant, for John Aspdene, of Lancashire, moves for a rule on Mrs. Poole and Mrs. Jones, and on John A. Brown, administrator of John Aspdene, of London, to show cause why they should not be required to elect on which petition or bill they will proceed, and to abide by the one elected and abandon the other (J. R. Ingersoll, for the executor, Mr. Nixon, makes the same motion as Mr. Sergeant)," ought to be granted or not ? And the said judges being so opposed in opinion upon the questions aforesaid, the same were then and there, at the request of Ingersoll, counsel for Henry Nixon, and Sergeant, counsel for John Aspdene, of Lancashire, stated under the direction of the [410] judges, and *ordered to be certified under the seal of the court, to the supreme court, at their next session to be held thereafter ; to be finally decided by the supreme court.

The case was argued on the questions presented in the certificate, by *H. J. Williams*, for Mrs. Poole and Mrs. Jones ; and by *Coxe*, for John A. Brown, administrator. *Ingersoll* appeared for the executor, and disclaimed any other interference in the case but for his protection. *Rawle* argued the case for John Aspdene, of Lancashire. The decision of the court upon the question presented in the argument was not given, as the court considered it could not entertain jurisdiction of the question certified. The arguments of the counsel are, therefore, not inserted.

STORY, Justice, delivered the opinion of the court.—This was the case of a certificate of division of opinion from the circuit court for the district of Pennsylvania, certified to this court under the act of congress of the 29th of April 1802, ch. 32, § 6.

The case was formerly before this court, and the decision will be found reported, under the name of *Harrison v. Nixon*, in 9 Pet. 463, &c. Upon the mandate in that case being returned to the circuit court, further proceedings were had in conformity thereto ; and in the course of those proceedings, the questions now propounded to this court upon the certificate arose. They are as follows : 1. Whether it is necessary that an affidavit be made to the pleas in bar to the petition of John A. Brown, or to any part thereof : and if so, to what part ? 2. Whether the rule moved for by Ingersoll and Sergeant, on the 14th day of November 1835, in the following words : " Mr. Sergeant, for John Aspdene, of Lancashire, moves for a rule on Mrs. Poole and Mrs. Jones, and on John A. Brown, administrator of John Aspdene, of London, to show cause why they should not be required to elect on which petition or bill they will proceed ; and to abide by the election and abandon the other (J. R. Ingersoll, for the executor Mr. Nixon, makes the same motion as Sergeant)," ought to be granted ?

We are of opinion, that the questions are not of such a nature as are contemplated to be certified to this court, under the act of 1802, ch. 32. They

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are questions respecting the practice of the court in equity *causes ; and depend upon the exercise of the sound discretion of the court, in the application of the rules which regulate the course of equity proceedings to the circumstances of each particular case. But it is to be understood, that in the present case this general discretion is subject to the former order of this court, in regard to the making of parties, and other proceedings contained in the mandate ; when the cause was remanded at the last January term of this court, as stated in 9 Pet. 540. We shall accordingly direct this opinion to be certified to the circuit court.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Pennsylvania ; and on a certificate of division in opinion between the judges of the said circuit court upon the following questions, viz : 1st. Whether it is necessary that an affidavit be made to the pleas in bar to the petition of John A. Brown, or to any part thereof ; and if so, to what part ? 2d. Whether the rule moved for by Ingersoll and Sergeant, on the 14th day of November 1835, in the following words : " Sergeant, for John Aspdene, of Lancashire, moves for a rule on Mrs. Poole and Mrs. Jones, and on John A. Brown, administrator of John Aspdene of London, to show cause why they should not be required to elect on which petition or bill they will proceed, and to abide by the one elected and abandon the other (J. R. Ingersoll, for the executor of Mr. Nixon, makes the same motion as Mr. Sergeant)," ought to be granted ? and these questions were argued by counsel : On consideration whereof, it is the opinion of this court, that neither of these questions is of such a nature as are contemplated to be certified to this court under the act of the 29th of April, 1802, ch. 32. That they are questions respecting the practice of the court in the application of the general rules which regulate the course of equity proceedings to the circumstances of each particular case ; and therefore, this court have no jurisdiction to answer the same. But it is to be understood, that in the present case, this general discretion is subject to the former order of this court in regard to the making of parties, and other proceedings contained in the mandate, when the cause was remanded at the last January term of this court. It is, therefore, ordered and adjudged, that this opinion be certified to the said circuit court ; and that the cause be remanded for further proceedings.

*THOMAS ELLICOTT and JONATHAN MEREDITH, Plaintiffs in error, [*412
v. WILLIAM PEARL.

Evidence.—Hearsay.—Impeaching a witness.—Boundary.—Adverse possession.

At the trial of a writ of right, in the circuit court of Kentucky, a witness was offered, to prove that one Moore, who was dead, and whose name was put down as one of the chain-carriers in making the original survey, and who was subsequently present when lines were run on the same land, had declared, that a certain corner was the corner made by the surveyor, Kincaid, when the original survey was made and the line run by the direction of the surveyor, for the original survey ; the circuit court rejected the evidence : *Held*, that the circuit court did not err in rejecting this evidence

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The evidence was not merely hearsay ; but hearsay not to matters of general reputation, or common interest among many.

The general rule is, that evidence, to be admissible, should be given under the sanction of an oath, legally administered ; and in a judicial proceeding, depending between the parties affected by it, or those who stand in privity of estate or interest with them. Hearsay is admitted in cases of pedigree, of prescriptive rights and customs, and some other cases of a public, or *quasi* public nature. In cases of pedigree, it is admitted, upon the ground of necessity, or the great difficulty, and sometimes the impossibility, of proving remote facts of this sort by living witnesses ; but in these cases it is only admitted, when the tradition comes from persons intimately connected, or in close relation, with the family, or from sources of a kindred nature, which, in a general sense, may be said to import verity ; there being no *litis mota*, or other interest, to affect the credit of their statement.

In cases of prescriptive rights and customs, and other claims of a public nature, tradition and reputation have been, in like manner, admitted ; they are all cases of a general right, affecting a number of persons, having a common interest.

The distinction seems now clearly established in England, that hearsay, or reputation, or tradition, is not admissible, in cases of mere private rights ; but only in cases of public rights, or those *quasi* *publici*, involving similar interests of a number of persons. Perhaps, a reason may be found, which, upon principle, would well support this distinction ; it is, that, in regard to private rights, the acts, profession and assertion of title by the parties claiming for themselves are, in all cases, susceptible of direct proof ; but in cases of public rights, the acts, profession and assertion of title by many persons, not in privity with each other, cannot be explained or qualified to be in furtherance of a common public right ; unless the evidence of general reputation were admissible, to explain the intention and objects of the parties in those acts, or that possession or assertion of title ; that is to say, whether done in furtherance of a common right or of a private right.¹

Kincaid had been examined as a witness for the defendants (by way of deposition), and the tenants, thereupon, gave in evidence the conversations and declarations of Kincaid, to certain witnesses, in order to discredit his (Kincaid's) testimony, and to show that he had stated, that the survey was made by him, at the mouth of Raccoon creek, for Remey ; when it was his interest to place it at Pond creek. The defendants, then, with a view to sustain Kincaid, and to

*418] support the statements "going to his interest," offered witnesses to prove the statements and conversations of Kincaid, at other times, corresponding with the statements in his deposition, relative to his making the surveys of Thompson and Remey ; and it being suggested by the defendants, upon an inquiry from the court, that these statements and conversations were subsequent to that testified to by the tenant's witnesses ; the court, upon an objection taken by the tenants, excluded the evidence. The evidence was properly excluded ; where parol proof has been offered against the testimony of a witness under oath, in order to impeach his veracity, establishing that he has given a different account at another time ; we are of opinion, that, in general, evidence is not admissible, in order to confirm his testimony, to prove, that at other times, he has given the same account as he has under oath ; for it is but his mere declaration of the fact ; and that is not evidence. His testimony under oath is better evidence than his confirmatory declarations not under oath ; and the repetition of his assertion does not carry his credibility further, if so far, as his oath.² This is said, in general, because there are exceptions ; but they are of a peculiar nature, not applicable to the circumstances of this case ; as, where the testimony is assailed as a fabrication of a recent date, or a complaint recently made ; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted.³

The tenants, in order to prove the boundaries of the defendants' land, as laid down in the plat, and claimed by them, gave in evidence the original plats and certificates of survey of their 2000 and 1000 acre tracts ; and then examined McNeal, a witness for the defendants, who was first introduced to prove their boundary ; who stated, that the water-courses, as found on the ground, did not correspond with those represented on the said plats ; and after being examined by the defendants, for the purpose of proving that the marks on the trees, claimed by

¹ Winter v. United States, Hempet. 344; Hunnicutt v. Peyton, 102 U. S. 333. And see note Mina Queen v. Hepburn, 7 Cranch 290.

² Craig v. Craig, 5 Rawle 91; People v. Vane, 12 Wend. 78; People v. Moore, 15 Id. 419; Herrick v. Smith, 18 Id. 446.

People v. Rector, 19 Id. 569.

³ See Hester v. Commonwealth, 85 Penn. St. 139; Zell v. Commonwealth, 94 Id. 258. And see Hotchkiss v. Germania Ins. Co., 5 Hun 90; Herrick v. Smith, 18 Id. 446.

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them as the corner and lines of their surveys, were as ancient as the said surveys, and also as to the position and otherwise of the lines and corners claimed by them, and represented on the plat made and used at the trial; stated, on the cross-examination of the tenant's counsel, that some of the lines, marked to suit the calls of the said surveys, appeared to be younger; and others, from their appearance, might be as old as the date of the said plats. The defendants, to counteract this evidence, and to sustain their claim, offered in evidence a survey, made out by McNeal, in an action of ejectment formerly depending between the same parties, for the same land, of which survey Pearl had due notice; the tenants objected to the reading of the explanatory report accompanying this survey, and the court refused to allow so much thereof as stated the appearance as to age and otherwise of the lines and corners to go in evidence to the jury; and accordingly caused to be erased from the plat the words following, viz., "ancient" (chops);—"John Forbes, jun., states that he cut the same letters and figures;"—"on the east side, no chops appear to have been marked with a larger axe, then the chops on the beginning tree;"—and then permitted the residue of the report and plat to go in evidence: *Held*, that the evidence was properly refused.

The assumption that there can be no possession to defeat an adverse title, except in one or other of these ways, that is, by an actual residence, or an actual inclosure, is a doctrine wholly irreconcilable with principle and authority; nothing can be more clear, than that a fence is not indispensable to constitute possession of a tract of land; the erection of fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. But there are many other acts, which are equally evincive of such an intention of asserting such "ownership and possession; such as entering upon land and making improvements thereon; raising a crop of corn; felling and selling the trees thereon, [*414 under color of title.

An entry into possession of a tract of land, under a deed containing specific metes and bounds, gives a constructive possession of the whole tract, if not in any adverse possession; although there may be no fence or inclosure round the ambit of the tract, and an actual residence only on a part of it. To constitute actual possession, it is not necessary, that there should be any fence or inclosure of the land.

Where there has been an entry on land, under color of title by deed, the possession is deemed to extend to the bounds of that deed; although the actual settlement and improvements were on a small parcel only of the tract. In such a case, where there is no adverse possession, the law construes the entry to be co-extensive with the grant to the party; upon the ground, that it is his clear intention to assert such possession.

The defendants in a writ of right claimed adversely to all the tenants, upon a title independent and distinct from theirs; the tenants all claimed under an adverse title, by deed of 7000 acres; that is, under a title common to them all. The defendants could not recover any tract in controversy, unless they were seized thereof, within thirty years, the period prescribed by the statute of limitations for writs of right; if, therefore, there had been thirty years' adverse possession of the particular tract in controversy, by any of the tenants the defendants failed in their suit, and were debarred from any recovery.

The court instructed the jury, that if they should find, that the patent for the land, under which the title of the tenants was derived, did not cover all the land; yet, if they found from the evidence, that the tenants, or any of them, or those claiming under them, had had possession of the land in contest, for thirty years next before the commencement of the defendants' suit, they must find for the tenants.

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ERROR to the Circuit Court of Kentucky. The plaintiffs in error, citizens of the state of Maryland, on the 17th day of January 1831, sued out of the circuit court of the United States for the district of Kentucky, a writ of right, against William Pearl, for a tenement containing 1000 acres of land, in the county of Laurel, in the state of Kentucky. The defendant appeared and took defence, and put himself on the assize; praying recognition to be made, whether he had greater right to hold the said tenement, with the appurtenances, as he held it; or whether the defendants, Ellicott and Meredith, to have it, as they demanded it. The defendant afterwards did likewise.

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At May term 1834, the case was tried by a jury, who returned into court the following verdict : " We, the jury, find that the tenant has more right to have the tenement, as he now holds it, than the defendants to have it ; " *415] and the circuit court gave judgment for the tenant accordingly. *At the same term of May, 1831, other writs of right were issued out by the plaintiffs, against other tenants of the land ; and the like proceedings and judgment took place.

On the trial of the case, the following bill of exceptions was filed. The parties having agreed that these causes should be heard at the same time, without prejudice to the right of either party, and that the evidence should be heard as to all, and to be applied to each respectively, the jury was so sworn ; and the plaintiff, to support his part of the issue, introduced the patents to James Kincaid for 2000 acres, and for 1000 acres, and deed from James Kincaid to Samuel and Robert Smith, and the deed from Robert Smith to Samuel Smith, and the deed from Samuel Smith to the defendants, in the words and figures following. [The patents and deeds were inserted.]

The boundaries of the 2000 acres, surveyed and granted to James Kincaid, were "in Lincoln county, on the east fork of Rockcastle, beginning at Kincaid's lick, on a branch of said fork, and on the north side, thence south and east for quantity, and bounded as followeth, to wit : beginning at said Kincaid's lick, on a branch on the north side of the east fork of Rockcastle, two beeches, thence south, 566 poles, crossing said fork to two white oaks, thence east, 565½ poles, crossing several branches to a white and black oak, thence north, 566 poles, crossing said east fork to two black oaks, thence west, 565½ poles, to the beginning."

The boundaries of the 1000 acre survey, were "in Lincoln county, on the waters of Rockcastle, to begin at Grigsby's south-east corner of his entry of 2000 acres of land, thence west, with Grigsby's line, to his corner, thence south for quantity, and bounded as followeth, to wit : beginning on said Nathaniel Grigsby's south-east corner, at a white oak and black oak, thence west, 565½ poles, crossing several branches with said Grigsby's line to his corner at two white oaks, thence south, 283 poles, to two black oaks, thence east, 565½ poles, crossing some branches, to two chestnut oaks, thence north, 183 poles, to the beginning, with its appurtenances."

The parties also agreed, that the trial of each and all the cases should be *416] had on the merits, as though there were no blanks in the *pleas, and that neither party should take advantage of any defect in the pleadings.

The defendants also read the surveys of McNeal, the one made out in this case, and the one made out in the action of ejectment lately depending before this court, between the same parties, which surveys are made part of this bill of exceptions, by reference, and also introduced the said McNeal, who stated on oath, that he was at the place shown on the plat as the beginning corner of Kincaid's 2000 acre survey ; that the trees stood in an island of Pond creek, and that the letters W. H. were made on each of the large trees, and on one of them, the letters I. K. were also marked ; that he ran the line running south from that point, and observed two sets of marks, the one appearing old, and the other not so old as Kincaid's survey ; that the old line-trees appeared about as old as the corner-trees and the letters,

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but that either was as old as the surveys of Kincaid, he could not say ; that all he could say was, that himself and others thought corner-trees and the old marks on the line, were made at the same time ; that he had cut out a block on the line, it appeared to count for an old line, but it had grown so close, that he could not count the annulations. The witness stated, that in running the south line, he had crossed Rockcastle three times, before he reached the corner, pursuing the course of the patent, in the manner represented in the connected plat in this cause, and that the plat correctly represents Rockcastle river, where it is crossed by the several lines of Kincaid's 2000, as run by him and laid down in the plat aforesaid. The plat made out in the action of ejectment, and which was read in evidence as aforesaid, was objected to as incompetent evidence in this cause, by the defendants, but the objection overruled. McNeal also stated, that in the plat made out in the ejectment case, Rockcastle river, except where it was crossed by the first line from the place shown him in the beginning, was laid down by protraction only, but he had actually surveyed and laid correctly the crossing of the river, by the different lines on the connected plat, in these causes ; each of the demandants admitted, that he resided, at the commencement of these actions, at the place represented as his residence on the plat and surveyor's report made in these causes, and that if the beginning corner of the patent of James Kincaid was at the point claimed by the demandants, the lands they respectively so hold, and claimed, were within the patent and deeds read in evidence by the demandants.

*The defendants then introduced the patent to Jacob Remey, and Jacob Remey's deed to William Edwards, and William Edwards's deed to the defendant, William Pearl, as follows : [The patents were here introduced.] The patent was dated the 15th of July 1789, and the land was described as a "certain tract or parcel of land, containing 29,000 acres by survey, bearing date the 7th day of November 1785, lying and being in the county of Lincoln, on the waters of Rockcastle, and bounded as followeth, to wit, beginning three quarters of a mile south of the mouth of Raccoon creek, and about ten poles from the same on the west side, at two white oak trees ; thence north, 2416 poles to a hickory and black oak trees ; thence west, 1920 $\frac{1}{2}$ poles to a white oak and black oak trees ; thence south, 2416 poles to a white oak ; thence east, 1920 $\frac{1}{2}$ poles to the beginning, with its appurtenances."

They then proved by the said McNeal, that the deeds aforesaid of Remey to Edwards, and from Edwards to Pearl, included the land in contest, and were correctly represented on the connected plat ; that he had followed an old marked line, from the mouth of Raccoon creek, running north, and out of which he cut two blocks, which he thought counted to the date of Remey's survey. That he had lived in the part of the country where the land in contest lies, upwards of thirty years, and had always known Rockcastle river, and Raccoon creek, by their respective names, since ever he had been acquainted in that part of the country ; that he was on part of the lines of Pearl's deed, in 1799, before Pearl settled on the land, and that in the spring of 1800, William Pearl, claiming the whole of the land described in his deed, under the patent to Remey, settled upon the land, as he understood, intending to take possession of his entire tract ; and that Pearl, and those claiming under him, have held the possession of the land ever since ; that the settle-

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ment of Pearl aforesaid, was made at or near the figures II, on the connected plat. That Pearl and those claiming under him, have always claimed to hold the land under Remey's patent; the other defendants all claimed under Pearl.

The defendant also introduced John Cook, who swore, that he was at the house of William Pearl, in the spring of the year 1800, and that he was then living on Rockcastle, near the place represented on the plat made *out [418] in this cause, by the figures II; that he came from the neighborhood of Goose creek, or by Terrell's camp; and that Terrell's camp was about four miles from Pearl's, rather east, and Pearl's was all the settlement he then knew of in that part of the country. He was not, at that time, at the place represented on the plat as the house where James McCammon lived in 1801, nor could he say whether McCammon was then living there or not; that place is several miles distant from the place at which William Pearl then lived.

The defendant called Metcalfe, who stated, that old James McCammon moved his family, and settled on the land in controversy, at the place represented as the house where James McCammon lived in 1801 on said plat, either in 1800 or 1801, and he thought 1800; and as he understood, under a purchase of a part of his land from William Pearl, but how much he did not know, nor could he say. He understood, that McCammon had contracted with Pearl for part of his land, and settled under that contract, and continued to hold the land aforesaid, for a year or two, when, by some arrangement or agreement between McCammon and Pearl, he, McCammon, got other land, part of Pearl's same tract, and Pearl took the place aforesaid; that the place first settled by McCammon had been ever since held and possessed by McCammon; Pearl and others holding under him; he could not say, whether his land was marked out to him or not; but he said, he never heard it was, nor did he ever hear that any deed was made: he also said, upon being interrogated by demandant's counsel, that one Hardy Hart settled under a contract of purchase from Remey, about the same time, he thought, at or near the same place; that he could not say, what year it was; he said, that he could not speak positively of the year McCammon first settled, but it was the same year one of his children was born; and he always thought it was on the same year his daughter Jenny was born, until he came here; but she being of the same age that a brother of McNeal, the surveyor, was, and McNeal's brother being, as he was then told by McNeal, thirty-one years old, next July, he had, on reflecting upon the subject, become satisfied, that it was his daughter, who he thought was about two years older than Jenny, that was born about the same time that McCammon settled as aforesaid, so that he had concluded that McCammon had settled in either 1800 or [419] 1801; and that he thought that he and Pearl settled about the same time; and that the land has been settled and held by one or another, under Pearl's claim, ever since.

McNeal was then called, and stated, that he could not state when McCammon settled; that all he could state was, that his, McCammon's, boys, were there, making the improvements for their father, the fall before he, McCammon, brought his family and settled, as witness had, in the spring of the year, assisted them to roll logs, at which time the old man had not removed to the place, from which he inferred, that they had been there the

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winter before ; but could not say, when they did first go on the land, nor could he state what year he rolled the logs ; that Pearl settled near the figures II, as stated on his plat, in the spring of the year 1800 ; that he, Pearl, that year, made sugar and tapped trees, within the 1000 acres of the demandants, as laid down ; but his house and clearings did not interfere with the 1000 acres ; that his brother, that was of the same age of Jenny, the daughter of the witness, would be thirty-one in next July ; that he understood, that Pearl settled at the figures II, claiming, under his purchase of Edwards, his whole tract ; he was asked by demandants' counsel, whether Pearl did not tell him, that McCammon settled in 1801, and in answer, he said, that at the direction of Pearl, he had represented the place on the plat to be the one at which McCammon lived in 1801.

The demandants then examined John Cook, who stated, that he was acquainted with Hardy Hart, spoken of by the witness Metcalfe, and that he resided on Goose Creek, below the salt-works, in the month of July 1802. That he and the company arrived at the salt-works, on the 2d of July 1802 ; that the said Hardy Hart was then living below the Goose Creek salt-works, on Goose Creek, on the south fork of Kentucky ; that after he arrived at the salt-works, he and his company purchased corn of him, the said Hardy Hart, for their wagon horses ; that he continued to reside there, some time afterwards, how long he could not say, but he thought until fall, when he removed to Rockcastle, and settled near to William Pearl's.

The demandants, to show that Remey's patent did not cover their patents, but that it covered land at or near the mouth of Pond creek, read the deposition of James Kincaid, and which is made a part of this bill of exceptions.

The deposition of James Kincaid stated, in substance, that he received Thompson's warrant from Allen, and bound himself to locate and make the survey. He received Remey's warrant from *Nathaniel Grigsby. He was never at the mouth of Raccoon creek, until he went there in [*420 company with George Thompson, between 1798 and 1799. Before he made the survey, he did not particularly understand the geography of the country. He went from the Crab orchard ; and we went what was called the Crab orchard trace ; but we did not travel the trace as far as the Hazelpatch. He had travelled the trace before, and he thought he could go a nearer way to Raccoon creek, through the woods. He was apprised of the place where the trace crossed Raccoon creek ; and when we got in the flat, near the Hazelpatch, we turned off to the left hand, to strike the mouth of Raccoon creek ; and after travelling some distance, we struck a water-course, supposed by me to be Raccoon creek, and he went down it to the mouth, or to where it and another creek came together ; and we supposed, that was the mouth of Raccoon creek. George Wilson, Reuben Terrell, William Moore, and a young man by the name of Myres, were there ; and he don't remember others, but he thinks there was another man by the name of Crow.

The following was the manner of making the survey : we went there in the evening late, and encamped on a little dry branch, above the mouth of the creek, on the south side ; recollects, the next morning, he saw spruce pines standing on the bank, both above and below the mouth of the creek. Did not recollect of going to the mouth of the creek ; but took it for

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granted, from the appearance of the bottom on the north side of the river, that it must be the mouth of Raccoon creek. And next morning after we got there, he thinks we went down to the bluff, near the mouth of the creek ; and George Wilson, who was a young man, that he was learning to survey ; he had a compass, and he started to run the north line ; and myself and Reuben Terrell and William Moore, started and run the three-quarters of a mile south to the beginning corner ; but he did not think he marked the beginning corner that day, for we had but one tomahawk in the company, and George Wilson had taken that on the north line. But after measuring three-quarters of a mile from the mouth of the creek, we then stopped and started to run the west line of Thompson's and Remey's surveys : this line he marked "thirdly," with a butcher knife, and made Thompson's corner and Remey's with said knife, and returned to the camp the same evening, near the mouth of the creek, and there he met with George Wilson ; and he furnished him with his field-notes of the north line of Remey's survey, and we all went in company to the beginning that he had *ascertained the day before, and then made beginning corner *421] with a tomahawk. We then started and run the south line of Thompson's survey to the trace which was called Boone's trace, crossing it near the top of a ridge dividing the waters of Little and Big Raccoon ; that is, what he understands to be the waters of Big and Little Raccoon. Where he crossed the trace, he was more particular, and marked the line more plain, and continued the line the length of the survey, and made the corner.

He recollects to have run over a ridge from the mouth of the creek to the beginning, and rose a steep hill ; and after running the distance called for, made Thompson's corner, and continued the line to Remey's corner. Never has been at Remey's corner since. Described the trees at the corner. He did not think he crossed the creek, in running the south line of Thompson's survey. The survey was thought to be at Raccoon creek, because it was intended to be there ; and it was thought to be there, until it was discovered to be Pond creek, through mistake, instead of Raccoon creek. He discovered the mistake, when he went to the mouth of Raccoon creek in company with George Thompson and John Wood ; George Thompson and himself got John Wood to go and show us the nearest way to the mouth of Raccoon creek ; and when they got there, he told Thompson that was not the place he had made the survey ; and Thompson replied and said, that Wood said that was at the mouth of Raccoon creek. And at that time, he held Allen's bond for half of Thompson's survey, and Thompson was about buying his interest in the land ; and when he told him, that was not the place he made the survey, Thompson told him, he would give him a certain sum for his interest, provided he would then make the survey there, which he agreed to do ; and Thompson said, if he would make the survey at that place, he would hold the land from the way the patent had issued, calling for the mouth of Raccoon creek ; and that is the reason, that in the obligation to Thompson, that the waters of Raccoon is not named ; but instead of Raccoon, the waters of Rockcastle was inserted ; for he told Thompson that he would not be responsible for the land at Raccoon creek ; and he knew the other expression could be complied with, for he knew the survey was made on Rockcastle.

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John Kincaid and Jesse Shelton were present when he marked the course on the west bank of Raccoon creek. He was not with Charles Smith, when he made the survey at Pond creek. Neither William Pearl nor Moore was with them. He was sent for and *went to them, when they were near three miles from the course of the west bank. He did not tell William Smith, where the beginning was, because Thompson had requested him not to do so. He has an interest in Remey's dam; and it would be worth more, if the survey could be established at Raccoon creek. Has, since the original survey was made, been well acquainted with both places, and has no doubt the survey was made at Pond creek. He described the mouth of Pond and Raccoon creek particularly; and he stated, that he well recollects to have seen them, when the original survey was commenced.

On being asked, what he knew about a survey in the name of Nathaniel Grigsby, of 2000 acres, lying on the north fork of Rockcastle creek, entered on the 10th day of March, 1784, he answered: "I made the entry, but had no knowledge of the place at that time, but by information; but I employed William Henderson, a deputy-surveyor, to make the survey as above, and the following, to wit: Thomas Shelton, one thousand acres, on a treasury-warrant, No. 7746, as assignee of James Henderson, on the waters of Rockcastle, to begin at Grigsby's south-east corner of his entry of two thousand acres, as above, entered the 3d day of August 1784. Also, Thomas Shelton, seven hundred acres, on a treasury-warrant, No. 7747, beginning at the beginning corner of Grigsby's survey of two thousand acres. And it appears from record that Henderson did make the said surveys, because I did obtain patents for the same, and sold the same, with other lands, to the agents of Robert and Samuel Smith, but conveyed to the said Smiths by specialty, and acknowledged the same before the clerk of the court of appeals. Some time afterward, a young man by the name of Curry, applied to me to show the surveys of the land I had conveyed to said Smiths: I referred him to said William Henderson, and I understood, Henderson did show said Curry said lands; and I also understood, from a Mr. Forbes, who was employed as chain-carrier, that said Henderson, with said Curry, run around the said land and fresh marked the lines. Some time afterwards, my brother and myself went on to a certain lick on an east branch of Rockcastle, in order to bore for salt water; after working some time, and sinking down upwards of thirty feet, met with said Forbes, who then told us we were working within the lines of one of the surveys above described, wherein he had been employed chain-carrier for the purpose of fresh marking. On receiving *this information, we quit our work and went and examined the survey under the direction of said Forbes, and went to the beginning corner, it being two beeches, plainly marked; and it appeared to correspond with the patent and things called for therein, namely, the lick and the trees standing on the north side of the branch; and after examination, we were so well satisfied, that it was one of the aforesaid surveys, and that we were working within the lines of said survey, we abandoned our work entirely. And this deponent further sayeth, that the two beeches described as the beginning of Nathaniel Grigsby's tract of two thousand acres, stand on a creek now known by the name of Pond creek, but an eastwardly branch of Rockcastle; and I think and believe, that the survey of 29,000 acres of Jacob

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Remey, originally made, does not interfere with the aforesaid surveys from the aforesaid considerations ; and this deponent further sayeth not."

The demandants also read to the jury the survey made out by Lott Pitman, which is also made a part of the bill of exceptions, by reference, and called said Pitman as a witness, who stated, that he made out said plat, and that he found the objects as stated, and that the statement in the notes to said plat he believes to be substantially correct ; that he had counted the blocks chopped out of the line running north from the mouth of Raccoon creek, that one, to wit, the one taken out of the line nearest to the mouth of Raccoon creek, counted to the date of a survey made in 1786, and the one taken farthest off, corresponded to a survey of 1785. That he had followed the marked line, running from the mouth of Raccoon creek to a corner, said to be Ballard Smith's corner ; and that he found trees marked as corner-trees, corresponding with the call of Smith and Robert Rutherford's surveys. The plaintiff then read to him the surveys of Robert Rutherford, Ballard Smith, and asked him, if the old line did not correspond to these surveys ; he answered it did, and that date of Robert Rutherford's survey corresponded with the first block, and that of Smith's to that of the second shown by McNeal. That the distance stated by McNeal to the mouth of Raccoon, where he cut out the first block, would, he thought, be in the line of Rutherford, and where he said he cut out the second block, would be in the line of Smith ; he thought, said witness stated, that he had done much surveying in that part of the country ; he had much experience in tracing old lines, and in counting the annulations of marked *lines : and *424] that he knew of no survey in that part of the country, of the dates of 1785 or 1786, except the surveys of Rutherford, Ballard Smith and Remey ; that he had long known the line leading north, spoken of by the witness McNeal, and had always heard it called Rutherford's line to his corner, and then Smith's line. That Rutherford's land was settled, and those claiming under him, claimed that line as one of his boundaries ; said witness stated, that he began at the mouth of Pond creek, and ran a south line to the place shown, where a white oak corner stood, and shown by Camp Mullins and others, and then ran a west line for the dividing line between Thompson and Remey, and pursuing the line for some distance, he saw ancient marks, apparently made with a knife, that after he ran some distance, his compass left it, but, finding the line again, he pursued it, until they crossed Boon's old trace ; near to the trace, on both sides, he found the line marked more thickly ; that the marked line, thus found, when reversed, would, to about where Mullins showed the place for the corner ; that the line run as aforesaid was not a west line, but was run on a variation of nine degrees from the call in the patent ; that the ordinary variation of lines made, when Remey's purports to have been made, is about three degrees.

The demandants then called Camp Mullins, who stated, that a good many years ago, about twenty-four or twenty-five, he was taken to the mouth of Pond creek, to search for Remey's survey, with Charles Smith, the surveyor, Davis Caldwell, and —— Moore ; said Moore said, he was one of the original chain-men ; that they started at the mouth of Pond creek, and ran south, until the surveyor told them the distance called in Remey's patent was out ; and they then turned out to hunt for the corner ;

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that he found a white oak standing near to where the course and distance ended, plainly and anciently marked as a corner-tree. That he recollects, it was marked on the north and west sides, but could not say whether it was marked on the south side or not ; that the white oak was of a common cabin log, and that near to the tree lay the trunk of a white oak, not quite so large ; that the top of the log was burnt, so that no chops appeared on it, but that they turned it over, and found the under side plainly and anciently marked with three chops, apparently done with the same tool that the standing tree had been marked with ; that they then run north, and on the course of Remey's patent, saw line-trees plainly marked, that appeared old, and to have been made about the same time, and the same kind of tool that the white oak corner did ; and *that they run the west line and saw [*425 marks made with a knife, drawing-knife of some kind ; that he showed the place where said trees were, to Lott Pitman and McNeal, but that said tree and log are now gone, and a hole or hollow place is visible yet, where he thinks the white oak stood. That Moore, the chain-man to Remey's original survey, is now dead. That on the lines aforesaid there were many trees, plainly marked, and might be easily discovered by any person pursuing the courses. And also called Mullins, who stated that he was along with his brother Camp Mullins and others, when the white oak tree was found, and stated the same that Camp Mullins did as to the tree log and lines.

The defendants then called Henderson, who stated, that he had been on the ground, and shown the place spoken of by Mullins ; that he had accompanied the surveyor, when running north from said tree ; that they saw no line-trees now standing, but he saw several trees standing near where the survey run, blazed ; that his object in going on the ground (he being agent of defendants) was to find marked trees on the lines aforesaid, but after the most diligent search, neither he nor any other in company could find any marked trees ; that there were standing in the course of the line many trees. Pitman the surveyor made the same statement.

The defendant then called John Crook, who stated, that about 1801, he had been called on, as deputy-surveyor, by James Kincaid, whose deposition defendants had read, to lay off Jacob Remey's survey, in which said James Kincaid claimed an interest ; that he was taken to the place now claimed by defendants to be Remey's beginning corner, three quarters of a mile south of the mouth of Raccoon creek, and shown by said Kincaid as a white oak tree, or two white oak trees, as corners, and told by said Kincaid that he had made the survey of Remey there ; that he was directed by Kincaid to run the diagonal line from that to the north-west corner, to see if the survey would include a famous saltpetre cave, then esteemed of great value, claimed by said Kincaid under said patent of Remey ; that he ran the line to a tree which Kincaid showed as a corner-tree ; that tree was newly marked and not chopped through the rough bark ; and if it were in reality a corner and the beginning also, the survey would include nearly 40,000 acres of surplus land ; that in making the survey aforesaid, he acted under the order of court, in a suit in which Kincaid, the witness for defendants, was party or *interested ; that Kincaid was interested in making [*426 Remey's patent cover the saltpetre cave, and that if Remey's survey was originally made at Pond creek, his patent boundary would approximate

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the saltpetre cave, three or four miles nearer than if the survey had been made to begin where Kincaid then showed the beginning to him.

The defendant also called William Smith, who stated in substance what Crook stated, and further stated, that Kincaid said, that he would make new lines look like old ones, by putting aquafortis in the chops, and he stated that the chops on the white oak corner appeared to be too old for 1798, but he could not state how old it was ; they were not doubting, when it was shown as the corner by Kincaid, that it was so ; did not count the annulations, and was then but little accustomed to pursuing and hunting old lines ; said witness stated, that when they run the diagonal line, as stated by Crook, to the north-west corner, he felt satisfied, that the survey, to run from Raccoon, could not reach the saltpetre cave ; that to include the cave, seemed to be a principal object with Kincaid ; that it was then a bone of contention between Kincaid and others, and he himself was interested in defeating Kincaid in his attempt to include the cave by Remey's survey ; that the cave was then considered of great value by all ; that Kincaid had then got into possession of it, and was working it under Remey's patent ; said witness further stated, as did the witness Crook, that to begin Remey's survey, at the mouth of Pond creek, where Kincaid placed it in his deposition, would place it several miles nearer to the saltpetre cave ; he thought at least three or four miles nearer, and the same fact was proved by other witnesses.

Smith and Crook both stated, that the trees shown as aforesaid, by Kincaid, as Remey's beginning, were marked as corner-trees, such as are called for in Remey's patent ; that the marks had an ancient appearance ; as they were convinced it was the beginning corner, they could not pretend to judge from the appearance of the marks, the exact time the marks were made, but they were confident they must have been many years before 1798.

The defendants then called Titus Mershon, who stated, that at times he could not state, but thought several years since 1801, or the time spoken of by Crook and Smith ; that Kincaid, the witness, told him, that in the division of Remey's survey, he, Kincaid, had got the north end and worst land, and desired the witness to let Pearl know, that if he did not consent to a division, that he would prove the survey at the mouth of Pond creek ; that he could prove "it at either place, for he had made a survey of *427] it, both at the mouth of Pond creek, and at the mouth of Raccoon creek ; that at another time, and subsequent to the conversation first detailed, Kincaid offered to him to buy state warrants in the name of the witness, and lay them upon Pearl's land or Remey's survey, and that he would prove Remey's survey at the mouth of Pond creek ; and that he, Kincaid, and the witness, Mershon, would divide the land between them ; that no one was present at these conversations ; the witness said, that he rejected the proposition of Kincaid, and Kincaid said, if he would not, others would. He, the witness, said, that Kincaid went on to remark to him, that when he made the survey at Raccoon creek, his brother-in-law, Wilson, was in company, and he, Kincaid, informed the witness, how it happened, that the corner three-quarters of a mile from the mouth of Raccoon creek had not been made on a true south course, and why the line had not been

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properly marked ; he said, the ground, or some of it, was so they could not run over it, and they took off-ssets and lost their reckoning ; and Kincaid said, that when they so run from the mouth of Raccoon to the beginning corner, some of the company went on one side of the creek, and some on the other. The witnesses all concurred in proving, that ever since Pearl settled in 1801, he and those holding under him, had claimed the land in contest under the patent of Remey.

The demandants then called Lott Pitman, who stated, that from about the place spoken of by Crook and Smith, and shown to them as the place of beginning for Remey and Thompson's survey, and where they saw a white oak corner, he had run a west line, the distance called for in Thompson's patent, at the end of which, he found corner-trees standing, marked to correspond with Thompson's patent ; that he had cut, or seen cut, out of the said line, several blocks ; the annulations of which counted back to 1798. Said witness stated, that to begin at Pond creek, and run south the distance called for in Remey's patent, to the place shown by Mullins, where the white oak corner stood, the line did not cross Rockcastle and land on the west side of the stream ; that Rockcastle, at its juncture with Pond creek, was narrow, and Pond creek appeared wide, but that Rockcastle run, he thought, double the water that Pond creek did ; said witness also stated, as did McNeal, that to run the course of Remey's patent south from the mouth of Raccoon creek, the distance called for, crossed Raccoon creek three times, and ended on the east side of the creek, and about fifty poles from the place stated by Smith and *Crook, as shown by Kincaid in 1801, for the beginning corner of Remey and Thompson's surveys ; said witness stated, and so [*428 did McNeal, that these two streams emptied into the east fork of Rockcastle river, called Raccoon, the one called Big Raccoon and the other Little Raccoon ; that the stream where Pearl claimed the survey to be, was called Big Raccoon creek ; that Little Raccoon empties into Rockcastle, about two miles below Big Raccoon.

The defendants then called Camp Mullins, who stated, that the white oak corner at the mouth of Pond creek, of which he had spoken, and the line running north from it, appeared to be marked with a tomahawk ; and also — Mullins, his brother, who stated the same.

The foregoing being the substance of the evidence given on both sides, the plaintiffs offered to prove, by witnesses, that William Moore, whose name is put down as one of the original chain-carriers in making Remey's survey, was dead, and that he attended the witness, Camp Mullins, about twenty-four or twenty-five years ago, when Charles Smith ran from the mouth of Pond creek to the white-oak tree, and also ran the line north running from the mouth of Pond creek, and that while at the corner and running the line, he declared that to be the corner made by Kincaid, and the line run by Wilson, by the direction of Kincaid, for Remey's original survey, and also to prove what said deceased chain-man had stated to others, relative to the boundary of Remey's patent, and the making of the original survey, since the settlement and possession of Pearl on the land in controversy. To the giving the statement and declarations of said chain-carrier, though proved to be dead, while at the corner, and on the line, or at any other time or place, since the survey was made, the defendant objected, as incompetent evidence for any purpose in this cause, and his objection

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was sustained by the court, and the declaration of the deceased chain carrier was not permitted to be given in evidence. To which opinion of the court, in refusing the evidence or any part of it, the defendants excepted, and prayed the court to sign and seal this their bill of exceptions. (No. 1.)

Memorandum.—After the defendant had given in evidence the conversations and declarations of James Kincaid, with the witnesses, Mershon, Smith and others, with a view to discredit Kincaid, and to show that he had stated that survey was made by him at the mouth of Raccoon for Remey, when it was his interest to place it at Pond creek, as it might then, with less surplus, include the salpetre cave; the defendants, with a view to sustain Kincaid, and to *report the statements going to show his [429] interest, offered witnesses to prove the statements and conversations of Kincaid, and corresponding with the statements made in his deposition, relative to his making the surveys of Thompson and Remey. To the giving such statements and conversations in evidence, for the purpose aforesaid, or any other, the defendants objected; upon which the court inquired of the counsel for the defendants, whether the statements of Kincaid, which he proposed to give in evidence, were made by him, as given in evidence by the tenants: to which he answered, he did not know, but he supposed subsequent; and thereupon, the objection was sustained by the court, and the evidence excluded; to which opinion of the court, the defendants except, and pray, &c. (No. 2.)

The defendant, to prove the boundaries of the defendants, as laid down on the plat and claimed by them, gave in evidence the original plats and certificates of surveys of James Kincaid's 2000 and 1000 acres surveys, and then examined defendants' witness, McNeal, the same person first introduced by them to prove their boundary, who stated, that the water-courses, as found on the ground, did not correspond with those represented in said plats; and after being examined by defendants' counsel, for the purpose of proving that the marks on the trees claimed by them as the corner and lines of their surveys were as ancient as said surveys; and also as to the position and otherwise of the lines and corners claimed by them, and represented on the plat made in this cause, and used before on this trial, stated on the cross-examination of the defendants' counsel, that some of the line-trees marked to suit the calls of said surveys, appeared to be younger, and others, from their appearance, might be as old as the date of said plats; and the plaintiff to counteract this evidence, and to sustain his claim, offered in evidence the following survey, made out by McNeal, in an action of ejectment formerly depending between the same parties, and for the same land in this court, which he obtained from the papers in that cause in the progress of this trial; defendants proved, that the tenant Pearl had notice of the time of the making said survey. To the reading of which report, for the purpose aforesaid, or for any other in evidence in this cause, the defendant objected, and the court refused so much of said report as stated the appearance as to age and otherwise of the lines and corners, &c., [430] to go in evidence to jury, and caused to be *erased from the plat the following words [here words erased or underscored were inserted], and permitted the balance of the report and plat to go in evidence. To which opinion of the court in refusing the remarks and notes of the surveyor, McNeal, to be given in evidence as aforesaid, the defendants.

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except, and pray the court to sign, &c., this their bill of exceptions. (No. 3.)

The evidence being closed, the defendants moved the court to instruct the jury, that if they believe, from the evidence, that the survey of Jacob Remey, and the adjoining survey of George Thompson, was, in point of fact, made at the mouth of Pond creek, by beginning at or near the letter L, on the plat, that the law locates the patent on the ground, where it was actually surveyed, notwithstanding the call or reference in said patents, or of either of them, to the mouth of Raccoon creek; and if they find, that the patent of Remey, as surveyed, does not interfere with the claim of the plaintiffs, that they ought to find for the plaintiff, unless they find that defendants have had possession, by an actual residence or fence, within the patent of plaintiffs, thirty years or more next before the bringing of these. This instruction the court overruled as moved, but struck out the word *fence* and inserted in the stead thereof, the words "improvements with the intention of taking possession." The instruction, so amended, was given to the jury, and the jury were also informed by the court, that the tapping or cutting the sugar trees, for the purpose of making sugar, and so using them, and the land, would not avail the tenant, under the act of limitations.

The defendants further moved the court to instruct the jury as follows: 2d. To instruct the jury, that the settlement of William Pearl at or near the II, as designated on the plat in 1800, outside of the patents under which the defendants claim, does not give any defence or limitation to the defendant's right to recover, though he settled within what he supposed to be Remey's claim, unless they find that Remey's survey, as actually made, and on which his patent issued, includes said settlement and the patent under which defendants claim. 3d. That unless they find that Remey's survey covers the patents under which the plaintiffs claim, that the settlement of McCammon within the 2000, does not give a claim to a possession within the 1000 acre patent; nor does the possession within the 1000 acre patent, give any possession within the 2000 acres. That as to the 2000 acres, the statute runs as to that, from *the time a possession was taken by an [431
actual residence or by fencing, and the same as to the 1000; consequently, that if they find that one has been thus possessed adversely, for thirty years next before the bringing of this suit, and the other not; that as to the other not so held, they should find against such defendants as were within such patent, at the date of the defendants' writ, provided, these settlements are not included in Remey or Thompson's as originally surveyed. 4th. To instruct the jury that if they find from the evidence, that James Kincaid, the surveyor of Remey and Thompson, did, in point of fact, make the surveys of Remey and Thompson, or cause them to be made, and the patents issued thereon, beginning at or near the mouth of Pond creek, as designated on the connected plat, and that after he returned the certificate of survey and patents issued thereon, marked or caused to be marked, surveys with lines or corners to correspond with the calls of the patents, at Raccoon creek, that such marking or surveying is utterly void, and vests no title whatever in Remey, or his alienee, notwithstanding such surveys or marking may include the land in contest. 5th. That if they find Kincaid's beginning corner to be as represented on the plat, that then, as to this controversy, his surveys are properly laid down. The court overruled

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the instructions, No. 3, but give the other three instructions. To which decisions of the court in refusing to give to the jury the defendants' instruction, No. 1, as moved; and in refusing to give to the jury their instructions, No. 3 ; the defendants, by their counsel, excepted, at the time of the decisions, and now prayed that their bill of exceptions might be signed, sealed and enrolled, &c.

After the defendants had moved for the instructions stated in their fourth bill of exceptions, the defendant moved the following instructions. 1. That to enable the defendants to recover, they must have proved, to the satisfaction of the jury, that they, or those under whom they claim, have had seisin of the land in contest, within thirty years next before the commencement of their suits. 2. That if they find, from the evidence, that Remey's patent includes the land in contest, they must find for the tenants. 3. That if they find, from the evidence, that Remey's patent does *not [432] cover the land in contest, yet if they find, from the evidence, that the tenants, or any of them, or those claiming under them, or any of them, have had possession of the land in contest, for thirty years next before the commencement of the defendants' suits, they must find for the tenants. 4. That the plat and certificate of survey of Nathaniel Grigsby, upon which the patent for 2000 acres issued, is evidence, though not conclusive, of the objects noted by the surveyor. Which the court gave, except the first instruction moved for by defendants ; to which opinion of the court, in giving the second, third, fourth, fifth and sixth instructions, moved by the defendant as aforesaid, the defendants excepted, &c. The defendants prosecuted this writ of error.

The case was argued by *Underwood* and *Hardin*, for the plaintiffs in error. No counsel appeared for the defendant.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the judgment of the circuit court for the district of Kentucky, upon a writ of right, sued forth on the 17th of January 1831, in which the plaintiffs in error were the defendants. The proceedings are in the form prescribed by the statute of Kentucky ; and the cause was tried upon the issue joined by the parties. There were several writs of right against other tenants of distinct parcels of the same tract of land, held by the tenants, respectively, under a common title ; and all of them were tried at the same time, by consent of the parties, as the same evidence was applicable to each.

The defendants claimed title, through intermediate conveyances, to a tract of land of 2000 acres, lying on the east fork of Rockcastle, in Lincoln county, under a patent granted to James Kincaid, by the commonwealth of Kentucky, dated the 2d day of February 1796 ; and also another tract of land, containing 1000 acres, on the waters of Rockcastle, on the south side and contiguous to that of 2000, on a like patent, dated on the same day. The tenants claimed title to the premises under a patent from the commonwealth of Virginia to Jacob Remey, of 20,000 acres of land, lying on the waters of Rockcastle, dated on the 15th of July 1789. Remey, on the 20th of November 1799, conveyed 13,400 acres of the same tract to William Edwards : *and Edwards, on the 26th of December 1799, conveyed [433] 7000 acres of the same tract, by metes and bounds, to William Pearl, the tenant, under whom all the other tenants claim. The conveyance to

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Pearl comprehends all the land in controversy ; and the same land is also included in the patents to Kincaid.

At the trial, evidence was introduced by the tenants, to prove, that in 1800, Pearl entered into and settled on the tract of land so conveyed to him, intending to take possession of the whole tract ; and that he, and those claiming under him, have had possession of the same land ever since, and have always claimed to hold the land under Remey's patent. Evidence was also introduced, to prove that James McCammon (whose name is mentioned, as we shall hereafter see, in the bill of exceptions) moved his family and settled on a part of the land in controversy, either in the year 1800 or 1801, under a purchase from Pearl ; but how much land he purchased or held did not appear ; and about two years afterwards, by some arrangements between them, McCammon took some other part of Pearl's land, in the same tract, and Pearl took the place where McCammon had settled. Pearl's original settlement was a little outside of the southern bounds of Kincaid's 1000 acre tract, between Sugar Camp branch and Rockcastle : and McCammon's original settlement was within Kincaid's 2000 acres, south of Moore's creek.

The demandants then introduced evidence to show, that Remey's patent did not cover the lands patented to Kincaid, but that it covered land at or near the mouth of Pond creek ; and that the survey of Remey was in fact made on Pond creek (which was outside of the western boundary of Kincaid's patent), as the beginning corner, under a mistake that it was Raccoon creek. If so made, it was clear, from the plea, that Remey's survey was surveyed off the land in controversy. The foregoing are all the portions of the evidence, which seem necessary to be stated, in order fully to understand the bearing of the questions made at the trial.

The first question was upon the admissibility of the evidence of witnesses, offered by the demandants, to prove, that one Moore, whose name was put down as one of the original chain-carriers, in making Remey's survey, was dead ; and that he attended with the witness, Camp Mullins, about twenty-four or twenty-five years ago, when one Charles Smith ran from the mouth of Pond creek to the white-oak tree, and also ran the line north from the mouth of Pond creek ; *and while at the corner and running the line, he declared that to be the corner made by Kincaid [*484 (the surveyor), and the line run by Wilson, by the direction of Kincaid, for Remey's original survey ; and also to prove what Moore had said to others relative to the boundary of Remey's patent, and the making of the original survey, since the settlement and possession of Pearl on the land in controversy. This evidence being objected to, was rejected by the court ; and this constitutes the matter of the first exception of the demandants.

We are of opinion, that the evidence was properly rejected. It was not merely hearsay, but hearsay not to matters of general reputation, or common interest among many, but to specific facts, viz., the manner and place of running the boundary lines of Remey's patent. The general rule is, that evidence, to be admissible, should be given under the sanction of an oath, legally administered ; and in a judicial proceeding, depending between the parties affected by it, or those who stand in privity of estate, or interest with them. So it was laid down by Lord KENYON, in his able opinion in the *King v. Eristwell*, 3 T. R. 721. Certain exceptions have, however, been

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allowed, which perhaps may be as old as the rule itself. But these exceptions stand upon peculiar grounds; and as was remarked by Lord ELLENBOROUGH, in *Weeks v. Sparke*, 1 M. & Selw. 686, the admission of hearsay evidence, upon all occasions, whether in matters of public or private right, is somewhat of an anomaly. Hearsay is admitted in cases of pedigree; of prescriptive rights and customs; and of some other cases of a public or *quasi* public nature. In cases of pedigree, it is admitted, upon the ground of necessity, or the great difficulty, and sometimes, the impossibility, of proving remote facts of this sort by living witnesses. But in these cases, it is only admitted, when the petition comes from persons intimately connected, or in close relation, with the family; or from sources of a kindred nature, which, in a general sense, may be said to import verity; there being no *lis mota* or other interest to affect the credit of their statement. So the law was expounded by Lord KENYON, in the *King v. Eriswell*, 3 T. R. 723, and by Lord ELDON, in *Vowles v. Young*, 13 Ves. 143, and in *Whitelocke v. Baker*, *Ibid.* 514.

In cases of prescriptive rights and customs, and other claims of a public nature, tradition and reputation have been in like manner admitted. They are all cases of a general right, affecting a number of persons, having a common interest. In *Morehead v. Wood*, 14 East 329 note, Lord KENYON stated the ground of *this exception thus: "Evidence of reputation upon [435] general points is receivable, because all mankind being interested therein, it is natural to suppose, that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information." "But," he says, "how can this apply to private titles, either with regard to particular customs or private prescriptions? How is it possible for strangers to know anything that concerns only their private titles?" Lord ELLENBOROUGH, in *Weeks v. Sparke*, 1 M. & Selw. 686, commenting on this distinction between public and private rights, said, "I confess myself at a loss fully to understand upon what principle, even in matters of public right, reputation was ever deemed admissible evidence. It is said, indeed, that upon questions of public right, all are interested, and must be presumed conversant with them; and that is the distinction taken between public and private rights. But I must confess, I have not been able to see the force of the principle on which that distinction is founded, as clearly as others have done; though I must admit its existence." And in that case, which was the case of the claim of a prescriptive right to common by the defendants, as appurtenant to a messuage, evidence of reputation was admitted on the part of the plaintiff, to qualify that right, because the right in some sense partook of the nature of a public right, as it was understood, that there were other persons standing *in pari jure* with the defendant; and therefore, it was a question between the plaintiff and a multitude of persons. And, indeed, the distinction seems now clearly established in England, that hearsay, or reputation, or tradition, is not admissible in cases of mere private rights; but only in cases of public rights, or those *quasi* public, involving similar interests by a number of persons.(a) Per-

(a) See *Morehead v. Wood*, 14 East 327 note, 329; 1 Philips on Evid. ch. 7, § 7 (8d ed.), p. 190; 1 Stark. Ev. 82 (2d Lond. ed.); *Doe v. Thomas*, 14 East 323; *Freeman v. Phillips*, 4 M. & Selw. 491.

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haps, a reason may be found, which, upon general principles, would well support this distinction. It is, that in regard to private rights, the acts, possession or assertion of title by the parties claiming for themselves are, in all cases, susceptible of direct proof; but in cases of public rights, the acts, possession and assertion of title by many persons, not in privity with each other, cannot be explained or qualified to be in furtherance of a common public right, unless the evidence of general reputation were admissible to explain the intention and objects of the parties in those acts, or that possession or *assertion of title, that is to say, whether done in furtherance of a [**436] common right, or of a private right.

It is upon the ground of this same distinction, that general reputation is admitted, in England, in cases of disputed boundaries between parishes and manors; because the right affects many persons, and is of public notoriety and interest as to all the inhabitants of the parish or manor.(a) And yet, in England, it has been held, at *nisi prius* (though the point has not been settled by the highest authority), that general reputation as to the boundaries between private estates is not admissible evidence. That was so held by Baron GRAHAM, in *Clothier v. Chapman*, cited in 14 East 331 note.(b) The doctrine in America, in respect to boundaries, has gone further; and has admitted evidence of general reputation as to boundaries between contiguous private estates ;(c) but there it has stopped.

These are the principal, if not the only, classes of cases, in which hearsay and reputation have been deemed admissible evidence. The exclusion of it, in other cases, stands upon the general consideration, that it is not upon oath; that the party affected by it has no opportunity of cross-examination; that it often supposes better evidence behind; that it is peculiarly liable to be obtained by fraudulent contrivances; and above all, that it is exceedingly infirm, unsatisfactory and intrinsically weak in its very nature and character. On these accounts, judges, in modern times, have leaned against any extension of it, as being subversive of the security of the titles of parties to property; for upon a strict adherence to the rules of evidence, that security must essentially depend. This will be clearly seen by what fell from the court in the *King v. Eriswell*, 3 T. R. 707. In that case, Mr. Justice BULLER, though in favor of the admission of the evidence, upon the ground of authority, said: "the true line for courts to adhere to is, wherever evidence, not on oath, has been repeatedly received and sanctioned by judicial determinations, it shall be allowed; but beyond that, the rule that no evidence shall be admitted but what is upon oath, shall be observed." The doctrine of the other judges, on that occasion, went to the same extent. In *Doe v. *Thomas*, 14 East 323, the court held, that evidence of reputation, that the land had belonged to J. S. and was purchased of him by the first testator, though coupled with corroborative parol evidence, that the same had belonged to J. S., was inadmissible, upon the ground, that reputation was not admissible to prove the ownership of

(a) *Nichols v. Parker*, cited 14 East 331 note; *Paxton v. Dare*, 10 B. & Cres. 17.

(b) See also 1 Stark. Ev. p. 33-34 (2d Lond. ed.); Philips on Ev. ch. 7, § 7, p. 189-90 (8d ed.). But see *Barnes v. Mawson*, 1 M. & Selw. 77, 81.

(c) See *Caufman v. Presbyterian Congregation*, 6 Binn. 59; *Conn v. Penn*, Pet. C. C. 496, 511-12. See also, *The King v. Eriswell*, 3 T. R. 719.

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private property.(a) And Mr. Chief Justice MANSFIELD, in delivering his opinion in the case of the *Berkeley Peerage* (4 Camp. 414, 445), after stating that, by the general rule of law, nothing said by any person can be used as evidence between contending parties, unless it is delivered on oath, in the presence of those parties, said, "with two exceptions, this is adhered to in all civil cases: first, on the trial of rights of common and other rights claimed by prescription; and secondly, on questions of pedigree." Perhaps, this enumeration will, upon close examination, be found too narrow; but it shows the strictness with which the exception in favor of hearsay, tradition and reputation is constantly construed, as being against the general principles of evidence.

In this court, a like restricted doctrine has been maintained. In *Mima Queen v. Hepburn*, 7 Cranch 290, Mr. Chief Justice MARSHALL, in delivering the opinion of the court, said, "If other cases (of hearsay) standing on similar principles should arise, it may well be doubted, whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all."

These, and other cases also, fully justify the conclusion (which is indeed stated by elementary writers), that in order to authorize the admission of hearsay evidence (except in cases of pedigree), three things must generally concur: first, that the fact, to which the reputation or tradition applies, must be of a public nature; secondly, if the reputation or tradition relate to the exercise of a right or privilege, it must be supported by acts of enjoyment or privilege, within the period of living memory; thirdly, that it must not be reputation or traditional declarations to a particular fact.(b)

*This last qualification is most important in the present case, as [438] it applies directly to it, and is established by clear and decisive authority. In *Outram v. Morewood*, 5 T. R. 123, Lord KENYON said, "although a general right may be proved by traditional evidence, yet a particular fact cannot;" and Mr. Justice GROSE (the only other judge then in court) concurred in that opinion. That was a case, where hearsay evidence was offered to establish the identity of lands, and thereby a right to the coals in them; and it was held inadmissible. The same doctrine was recognised by Lord ELLENBOROUGH, in *Weeks v. Sparke*, 1 M. & Selw. 687; where, referring to evidence of perambulations, he admitted, that they were not evidence of a particular act done, as that such a turf was dug, or such a post put down, in a particular spot. So, Mr. Chief Justice MANSFIELD, in his opinion in the *Berkeley Peerage Case*, 4 Camp. 415, after alluding to the evidence of what dead men have said, as to the reputation of a right of way, common, and the like, said, "a declaration, with regard to a particular fact, which would support or negative the right, is inadmissible." Even in cases nearly approaching to those of pedigree, where hearsay is admissible of particular facts, such as marriages, births and deaths, and

(a) See Blarkett v. Lowes, 2 M. & Selw. 494.

(b) See 1 Stark. Evid. 82, 85 (2d Lond. ed.); 1 Philips on Evid. ch. 7, § 7, p. 178, 192; *Morewood v. Wood*, 14 East 827 note.

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their respective times ; it has been held, that hearsay as to the place of birth, is not admissible ; for it turns upon a single fact, that of locality, and that ought to be proved by the ordinary course of evidence. *Rex v. Erith*, 8 East 539. In *Mima Queen v. Hepburn*, 7 Cranch 290, the court decided, that hearsay evidence was not admissible to prove a specific fact, although the witnesses to the fact were dead ; and therefore, evidence of hearsay, that the ancestor of a person, suing for freedom, was free, was held inadmissible. The same point was again decided in *Davis v. Wood*, 1 Wheat. 6.

Upon these doctrines and authorities, we are of opinion, that the evidence, in the present exception stated, was rightly rejected. It was evidence, not to general reputation as to boundary, but to particular facts, and circumstances attendant upon the original making of Remey's survey.

The next exception is founded upon the refusal of the court to permit testimony to be given of the declarations of one Kincaid (the surveyor of Remey's survey), under the following circumstances : Kincaid had been examined as a witness for the defendants (by way of deposition), and the tenants, thereupon, gave in evidence the conversations and declarations of Kincaid, to certain witnesses, in order *to discredit his (Kincaid's) testimony, and to show, that he had stated, that the survey was made [*439 by him, at the mouth of Raccoon creek, for Remey, when it was his interest to place it at Pond creek. The defendants, then, with a view to sustain Kincaid, and to support the statements going to his interest, offered witnesses to prove the statements and conversations of Kincaid at other times, corresponding with the statements made in his deposition, relative to his making the surveys of Thompson and Remey ; and it being suggested by the defendants, upon an inquiry from the court, that these statements and conversations were *subsequent* to those testified to by the tenants' witnesses, the court, upon an objection taken by the tenants, excluded the evidence. In our opinion, the evidence was rightly excluded.

Where parol proof has been offered against the testimony of a witness under oath, in order to impeach his veracity, establishing that he has given a different account at another time, we are of opinion, that, in general, evidence is not admissible, in order to confirm his testimony, to prove that, at other times, he has given the same account as he has under oath ; for it is but his mere declaration of the fact ; and that is not evidence. His testimony under oath is better evidence than his confirmatory declarations, not under oath ; and the repetition of his assertion does not carry his credibility further, if so far, as his oath. We say, in general, because there are exceptions ; but they are of a peculiar nature, not applicable to the circumstances of the present case ; as, where the testimony is assailed as a fabrication of a recent date, or a complaint recently made ; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted.

It is true, that in *Lutterell v. Reynell*, 1 Mod. 282, it was held, that though heresay be not allowed as direct evidence, yet it may be admitted in corroboration of a witness's testimony, to show, that he affirmed the same thing upon other occasions, and that he is still constant to himself. Lord Chief Baron GILBERT has asserted the same opinion, in his Treatise on

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Evidence, page 135. But Mr. Justice BULLER, in his *Nisi Prius Treatise*, page 294, says, "but clearly, it is not evidence in chief; and it seems doubtful, whether it is so in reply, or not." The same question came before the house of lords, in the *Berkeley Peerage Case*; and it was there said by Lord REDESDALE, that he had always understood, that for the purpose of impugning the testimony of a witness, his declarations at another time might be inquired into; but not for the purpose of confirming "his evidence."

*440] Lord ELDON expressed his decided opinion, that this was the true rule to be observed by the counsel in the cause.(a) Lord Chief Justice EYRE is also represented to have rejected such evidence, when offered on behalf of the defendant, in a prosecution for forgery.(b) We think this is not only the better, but the true, opinion, and well founded on the general principles of evidence. There is this additional objection to the admission of the confirmatory evidence, in the present case, that it is of subsequent declarations; which would enable the witness at any time to control the effect of the former declarations, which he was conscious that he had made, and which he might now have a motive to qualify, or weaken or destroy.

In the further progress of the cause, the tenants, in order to prove the boundaries of the defendants' land, as laid down in the plat, and claimed by them, gave in evidence the original plats and certificates of survey of Kincaid's 2000 and 1000 acre tracts; and then examined McNeal, a witness of the defendants, who was first introduced to prove their boundary, who stated, that the water-courses, as found on the ground, did not correspond with those represented on the said plats; and after being examined by the defendants, for the purpose of proving that the marks on the trees, claimed by them as the corner and lines of their surveys, were as ancient as the said surveys, and also as to the position and otherwise of the lines and corners claimed by them, and represented on the plat made and used at the trial, stated, on the cross-examination of the tenants' counsel, that some of the lines, marked to suit the calls of the said surveys, appeared to be younger, and others, from their appearance, might be as old as the date of the said plats. The defendants, to counteract this evidence, and to sustain their claim, offered in evidence a survey made out by McNeal, in an action of ejectment formerly depending between the same parties, for the same land, of which survey Pearl had due notice. The tenants objected to the reading of the explanatory report accompanying this survey, and the court refused to allow so much thereof as stated the appearance as to the age and otherwise of the lines and corners to go in evidence to the jury; and accordingly caused to be erased from the plat the words following, viz.,

*441] "ancient" (chops);—"John Forbes, jun., *states he cut the same letters and figures;"—"on the east side, the chops appear to have been marked with a larger axe than the chops on the beginning tree;"—and then permitted the residue of the report and plat to go in evidence. This constitutes the third exception of the defendants.

We are of opinion, that there was no error in this refusal of the court. Strictly speaking, the defendants had no right, upon the principles already

(a) Cited in 1 Philips on Evid. ch. 8, page 218 note [280 note]; 1 Stark. Evid. 187 (2d Lond. ed.) and note n.

(b) Ibid.

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stated, to give in evidence any other prior statements of McNeal, to confirm his testimony. But, in truth, the evidence was offered to discredit, in part, his present testimony; and certainly, the defendants were not at liberty to discredit their own witness, by showing his former declarations on the same subject; though they might show by other witnesses that he was mistaken. But independent of these objections, the evidence was inadmissible upon general principles. It was mere hearsay. The survey, made by a surveyor, being under oath, is evidence as to all things which are property within the line of his duty. But his duty is confined to describing and marking on the plat, the lines, corners, trees and other objects on the ground, and to subjoin such remarks as may explain them; but in all other respects, and as to all other facts, he stands, like any other witness, to be examined on oath, in the presence of the parties, and subject to cross-examination. The reason, why a survey, made by a public surveyor, in discharge of his public duties, is admitted as evidence, in suits between other parties, is not that it is hearsay; but that the act is officially done, under oath, and in discharge of his duties to the government and the public. But it has never been supposed, that if, in such a survey, the surveyor should go on to state collateral facts, or declarations of the parties, or other matters, not within the scope of his proper official functions, he could thereby make them evidence as between third persons.

In the further progress of the trial, the defendants, after the evidence was closed on both sides, moved the court to instruct the jury, that if they believed from the evidence, that the survey of Remey and the adjoining survey of Thompson, were, in point of fact, made at the mouth of Pond creek, by beginning at or near the letter L, on the plat, that the law locates the patent on the ground, where it was actually surveyed, notwithstanding the call or reference on the said patents, or either of them, to [for] the mouth of Raccoon creek; and if they found that the patent of Remey, as surveyed, does not interfere with the claim of the defendants, that they ought to find *for the defendants, unless they find that the defendants have had possession by an actual, residence, or *fence*, within the [**442 patent of the defendants, thirty years or more before the bringing of these [suits]. The court refused to give this instruction, as moved; but gave the instruction as moved, after substituting for the word "*fence*" the words "improvements, with the intention of taking possession." To which refusal the defendants excepted.

It is wholly unnecessary for us to consider, whether the instruction, as given, is maintainable in point of law or not; and the only question is, whether the refusal to give it as prayed for, was incorrect. But this resolves itself into the point, whether it is absolutely necessary, to constitute a possession of land, sufficient to bar an adverse title thereto, under the statute of limitations, limiting writs of right to thirty years, that there should be an actual residence or fence, by the party claiming the benefit of the statute; that is, an actual residence on the land, or a *pedis possessio* of it, by an inclosure. The argument, in support of the instruction, as prayed, assumes, that there can be no possession to defeat an adverse title, except in one or other of these ways, that is, by an actual residence, or by an actual inclosure, a doctrine wholly irreconcilable with principle and authority. Nothing can be more clear, than that a fence is not indispensable to constitute possession

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of a tract of land. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. But there are many other acts, which are equally evincive of such an intention of asserting such ownership and possession ; such as entering upon land and making improvements thereon, raising a crop of corn, felling and selling the trees thereon, &c., under color of title.

An entry into possession of a tract of land, under a deed containing specific metes and bounds, gives a constructive possession of the whole tract, if not in any adverse possession ; although there may be no fence or inclosure round the ambit of the tract, and an actual residence only on a part of it. To constitute actual possession, it is not necessary, that there should be any fence or inclosure of the land. If authority were necessary, for so plain a proposition, it will be found in the case of *Moss v. Scott*, 2 Dana (Ky.) 275, where the court say, that "it is well settled, that there may be a possession in fact, of land not actually inclosed by the possessor." But this subject will naturally arise and be considered more fully under the next instruction *448] prayed for ; and it is only necessary to say, that we *perceive no error in the refusal of the court to give that which was here prayed for.

The demandants then prayed the court to instruct the jury, "that unless they find that Remey's survey covers the patents, under which the demandants claim, the settlement of McCammon within the 2000 acres does not give a claim to a possession within the 1000 acres patent ; nor does the possession with the 1000 acres patent give any possession within the 2000 acres patent. That, as to the 2000 acres, the statute runs as to that, from the time a possession was taken by an actual residence, or by fencing ; and the same as to the 1000 acres; consequently, that if they (the jury) find, that one has been thus possessed adversely, for thirty years next before the bringing of this suit, and the other not, that as to the other, not so held, they should find against such tenants as were within such patents, at the date of the demandants' writ ; provided, these settlements are not included in Remey's or Thompson's survey, as originally surveyed."

The latter part of this instruction as prayed, is disposed of by the considerations already suggested under the preceding head. The other part may require some further explanations, in order to show its bearing and pressure. The tract of 7000 acres conveyed by Edwards to Pearl, included, as has been already stated, both of the tracts of 2000 acres and 1000 acres claimed by the demandants, within its boundaries. The house and settlement of Pearl were on the southern side of the 1000 acres tract ; and the house and settlement of McCammon were within the 2000 acres tract, and near the centre of the eastern line of that tract. Pearl entered into possession of the 7000 acres tract, under his deed from Edwards ; and as that deed described the tracts by metes and bounds, Pearl must, upon the principles already stated, be deemed to have been in possession of the whole tract, unless some part of it was, which is not shown, in the adverse possession of some other claimant. In short, his entry being under color of title by deed, his possession is deemed to extend to the bounds of that deed ; although his actual settlement and improvements were on a small parcel only of the tract. In such a case, where there is no adverse possession, the law construes the entry to be co-extensive with the grant to the party ; upon the ground, that

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it is his clear intention to assert such possession. This doctrine is well settled. It was affirmed by this court, in *Barr v. Gratz*, 4 Wheat. 222-3; *and it has been fully recognised and acted upon by the state courts of Kentucky. In *Fox v. Hinton*, 4 Bibb 559, it was held by the [**444 court, that where two patents interfere in part, and before possession is taken under the elder patent, the junior patentee enters upon the land within the interference, with an intention to take possession, he shall be construed to be in possession to the extent of his claim. In *Thomas v. Harrow*, 4 Bibb 563, the same court held, that a person entering on land, under a deed of conveyance specifying the boundaries, is in possession to the extent thereof; although the person making the conveyance had only an entry, which did not appear to cover the land, and which had not been perfected by survey or patent. The cases of *Smith's Heires v. Lockridge*, 3 Litt. 19-20; *Cates v. Loftus*, 4 T. B. Monr. 442; *Moss v. Currie*, 1 Dana 267; *Boyce v. Blake*, 2 Ibid. 127; *Smith's Heirs v. Frost's Devisee*, Ibid. 148-9; and *Harrison v. McDaniel*, Ibid. 354, are to the same effect, and contain a full exposition of the doctrine.

McCammon having entered under Pearl, his possession must be deemed consistent with the title of Pearl. There is, however, no proof of the nature or extent of his claim in the case. If he entered under a deed from Pearl, then his possession would be co-extensive with the boundaries prescribed in that deed. If he entered without deed, his possession must either be deemed a continuation of that of Pearl, or bounded by his actual occupancy. In *Jones v. Chiles*, 2 Dana 28, it was held by the court, that if a landlord settles a tenant, without bounds, upon a tract of land, he is in possession to the limits of the claim. But if the tenant is restricted by metes and bounds to a part only of the land, the landlord's possession is in like manner limited. And upon the same principle, the court held, that if the proprietor of a tract sells a portion of it, designated by metes and bounds, and the vendee enters into possession, his entry must be deemed of his own land only; and it has no effect, as an entry upon or possession of the rest of the tract.

If, with these principles in view, we examine the instruction asked of the court, it will be found open to much objection. It assumes certain facts as its basis, which were not in evidence; or, if in evidence, they were for the decision of the jury. The court were asked to instruct the jury, "that the settlement of McCammon within the 2000 acres tract, did not give a claim to a possession within *the 1000 acres tract," without ascertaining, whether the claim or title of McCammon extended into the [**445 latter or not. Now, it is plain, that if his claim or title did extend into the latter, he would have had a constructive possession to the extent of that claim or title. The other part of the instruction asked is extremely vague. It is, "nor does the possession within the 1000 acres patent give any possession within the 2000 acres." It is not said, by whom the possession is supposed to be, whether by McCammon, or by Pearl, or by any other person. If the possession intended was that of Pearl, as both tracts were within his tract of 7000 acres, it is clear, that his possession would extend over both tracts, upon the principles already stated. If the possession intended was that of McCammon, it is open to the objection already stated, that the boundaries of his claim or title are not ascertained, so as to enable the court

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to give the instruction, as matter of law. In truth, the instruction asked seems to have proceeded upon a ground perfectly untenable in itself ; and that is, that as to third persons, who are in under title or color of title, their possession is bounded and limited by the nature and extent and origin of the distinct titles of their adversary ; and not by that under which they themselves have entered and taken possession. For these reasons, we are of opinion, that the instruction was properly refused by the court.

The last exception now insisted on, is on the following instruction, given by the court, upon the prayer of the tenants. "That if they (the jury) find, from the evidence, that Remey's patent does not cover the land in contest, yet, if they find, from the evidence, that the tenants, or any of them, or those claiming under them, have had possession of the land in contest for thirty years next before the commencement of the defendants' suit, they must find for the tenants." It is probable, that the actual form in which this instruction was asked, was occasioned by the agreement of the parties, that all these actions against the different tenants, upon the different writs of right, "should be heard at the same time," without prejudice to the rights of either party ; and that the evidence "should be heard as to all, and be applied to each, respectively," and therefore, that the instruction should be construed accordingly, *reddendo singula singulis*. But we see no objection to it, in the form which it was actually given, under the circumstances of the present case, and the titles set up by the parties, respectively. The defendants claimed adversely to all the tenants, upon a title independent and distinct from theirs. The *tenants all claimed under the title of Pearl, by his deed of the 7000 acres, that is, under a title common to them all. The defendants could not recover any tract in controversy, unless they were seised thereof, within thirty years, the period prescribed by the statute of limitations for writs of right. If, therefore, there had been thirty years adverse possession of the particular tract in controversy, by any of the tenants, the defendants had failed in their suit, and were barred from any recovery. This was the whole purport of the instruction given ; and, in our judgment, it was perfectly correct. It has been supposed, at the argument, that the instruction was defective, in not stating, that the possession was adversary and uninterrupted, during the whole thirty years ; and the case of *Forman v. Ambler*, 2 Dana 109-10, is relied on to sustain the objection. But the court, in that case, admitted, that the instruction was free from legal exception, as understood by the court and the parties. And whatever ground there might be for the court, in that case, to come to the conclusion, that the jury might have been misled by it (with which we do not intermeddle), under the peculiar circumstances of the case, we are of opinion, that, under the circumstances of the present case, the instruction was definite and unambiguous in its purport and effect, and such as the law justifies.

Upon the whole, the judgment of the circuit court is affirmed with costs.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*THOMAS D. OWINGS, Plaintiff in error, v. LUKE TIERNAN'S Lessee.

Practice.

The transcript of the record had been lodged by the plaintiffs in error with the clerk of the court, on the 24th of October 1835, who refused to file it or docket the cause, until the plaintiffs had given a fee-bond, in pursuance of the 37th rule of the court; the counsel for the plaintiffs in error moved to have the transcript filed and docketed; alleging they had done all the law required to be done, in order to bring the case before this court. On the part of the defendant in error, his counsel filed, and read in open court, certified copies of the writ of error, citation and appeal-bond, and of the judgment of the circuit court; and having stated that the plaintiffs in error had failed to have the case docketed, according to the 30th rule of the court, they moved to have the case docketed and dismissed. The court overruled the motion to docket and dismiss the cause; and also the motion to have the transcript filed, and the cause docketed without the fee-bond being first given. These motions were overruled on the 18th of January 1836; and the court allowed the plaintiffs in error until the 1st day of March following, to give to the clerk the fee-bond; on the failure so to give the same, the writ of error to be dismissed.

ERROR to the Circuit Court of Kentucky. *Underwood*, counsel for the defendant in error in this cause, having filed, and read in open court, certified copies of the writ of error, citation, and appeal-bond in this case, and the judgment of the circuit court of the United States for the district of Kentucky, rendered in said cause; and having stated that the plaintiffs in error had failed to have their transcript of the record of said cause filed with the clerk, and their cause placed upon the calendar of this court, according to the rules thereof; now moved the court to have said writ of error docketed and dismissed, in pursuance of the 30th rule of the court; which motion was opposed by *Loughborough* and *Crittenden*, of counsel for the plaintiffs in error; who stated, that the transcript of the record of the cause had been lodged with the clerk of this court, the 24th of October 1835; who refused to file the record, or docket the cause, until the plaintiffs in error had given the usual fee-bond, under and in pursuance of the 37th rule of this court, of January term 1831; and that at the same time, the clerk gave to Mr. Loughborough, counsel as aforesaid, a blank fee-bond, which the plaintiffs in error had not executed, *supposing that they had done all that was required by law of them to do; and the said counsel [*448 for the plaintiffs in error moved the court to order said transcript to be filed, and the cause to be docketed.

On consideration whereof, and after mature deliberation thereupon, it was ordered by the court, that the motion of Mr. Underwood to docket and dismiss be overruled. And it is further considered and ordered by the court, that the motion of Messrs. Loughborough and Crittenden to have the transcript filed and the cause docketed, without the usual fee bond, be and the same is hereby overruled. And it is further now here ordered by the court, that upon the plaintiffs in error giving to the clerk the usual fee-bond, he, the clerk, shall file the transcript and docket the cause. And it is further now here ordered by the court, that if the plaintiffs in error shall fail to give to the clerk of this court the usual fee-bond required by the 37th rule of this court, of January term 1831, on or before the 1st day of March, next ensuing this date, that then and in that case, the writ of error in this cause shall be docketed and dismissed.

*JOHN VOORHEES, JEREMIAH LETTON, SCHONEY ACHLEY and NICHOLAS LONGWORTH, Plaintiffs in error, v. JAMES JACKSON, *ex dem.* the President Directors, and Company of the BANK OF THE UNITED STATES.

Conclusiveness of judgment in attachment.—Effect of error, in collateral suit.

Ejectment for a tract of land, commenced in 1831, which had been sold under the foreign attachment laws of Ohio, the defendants in the ejectment being in possession under the defendant in the attachment; the judgment, in the common pleas of Hamilton county, Ohio, in the attachment-suit was entered in 1808; the writ of attachment was returnable to April 1807; and it recited, that it had been sufficiently testified to the court, that the defendant, not residing in the state, was indebted to the plaintiff; the tract of land was attached, and returned with an inventory and appraisement; the defendant having made default, auditors were appointed; and at December term, they made a report, finding due to the plaintiff \$267; the court ordered the property to be sold by the auditors; at April term 1808, they reported, they had sold the premises for \$170; the court, on inspection, confirmed the sale; the auditors, afterwards, conveyed, by deed, to Samuel Foster and William Woodward, who on the same day, 28th of May 1808, conveyed the premises to William Stanley, with covenant of seisin, power to sell, and general warranty, under whom the plaintiffs in the ejectment derived title. The proceedings in the attachment were in conformity with the Ohio attachment laws, in all particulars, except: 1. No affidavit, as required by the statute, was found filed with the clerk; and the law provides that, if this is not done, the writ shall be quashed, on motion: 2. Three months' notice of the attachment is to be given in a newspaper, and fifteen days' notice is to be given by the auditors; which did not appear to have been done: 3. The defendant is to be called three times preceding judgment, and the defaults recorded; no record appeared to have been made: 4. Auditors are not to sell, until twelve months, and it did not appear when the sale was made: 5. The return of the sale showed a sale to Foster and Woodward, and a deed was made to Stanley, and no connection between them was shown in the record.

The several courts of common pleas of Ohio, at the time of these proceedings, were courts of general civil jurisdiction; to which was added, by the act of 1805, power to issue writs of attachment, and order of sale of the property attached, on certain conditions; no objection, therefore, can be made to their jurisdiction over the case, the cause of action, or the property attached. The process which they adopted was the same as prescribed by the law; they ordered a sale, which was executed; and on the return thereof, gave it their confirmation; this was the judgment of a court of competent jurisdiction, on all the acts preceding the sale, affirming their validity, in the same manner as their judgment had affirmed the existence of a debt. There is no principle of law better settled, than that every act of a court of competent jurisdiction, shall be presumed to have been rightly done, till the contrary appears; this rule applies as well to every judgment or decree rendered, in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action.

*Every matter adjudicated becomes a part of their record which, thenceforth, proves itself, without referring to the evidence on which it has been adjudged.

That some sanctity should be given to judicial proceedings; some time limited, beyond which they should not be questioned; some protection afforded to those who purchase at sales by judicial process; and some definite rules established, by which property thus acquired may become transmissible, with security to the possessors, cannot be denied. In this country, particularly, where property, which, within a few years, was but of little value, in a wilderness, is now the site of large and flourishing cities; its enjoyment should be, at least, as secure, as in that country where its value is less progressive.

It is among the elementary principles at the common law, that whoever would complain of the proceedings of a court, must do it in such time as not to injure his adversary by unnecessary delay in the assertion of his right; if he objects to the mode in which he is brought into court, he must do it, before he submits to the process adopted; if the proceedings against him are not conducted according to the rules of law and the court, he must move to set them aside for irregularity; or, if there be any defect in the form or manner in which he is sued, he may assign those defects specially, and the court will not hold him answerable till such defects

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are remedied. But if he plead to the action generally, all irregularity is waived ; and the court can decide only on the rights of the parties to the subject-matter of controversy ; their judgment is conclusive, unless it appears on the record, that the plaintiff has no title to the thing demanded, or that in rendering judgment they have erred in law ; all defects in setting out a title, or in the evidence to prove it, are cured, as well as all irregularities which may have preceded the judgment.

So long as this judgment remains in force, it is, in itself, evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment ; the errors of the court, however apparent, can be examined only by an appellate power ; and by the laws of every country, a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment. No rule can be more reasonable, than that the person who complains of an injury done him, should avail himself of his legal rights, in a reasonable time, or that that time should be limited by law.

The line which separates error in judgment from the usurpation of power, is very definite ; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity, collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity ; in the other, mere waste paper—there can be no middle character assigned to judicial proceedings, which are irreversible for error. Such is their effect between the parties to the suit, and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution. *Blaine v. The Charles Carter*, 4 Cranch 328; *Wheaton v. Sexton*, 4 Wheat. 506; *Tolmie v. Thompson*, 2 Pet. 157; *Elliott v. Piersol*, 1 Ibid. 840; *Wright v. Lessee of Hollingsworth*, *Ibid.* 169; *Taylor v. Thompson*, 5 Ibid. 370; *United States v. Arredondo*, 6 Ibid. 729, cited.¹

United States Bank v. Voorhees, 1 McLean 221, affirmed.

ERROR to the Circuit Court of Ohio. The President and Directors of the Bank of the United States *instituted an action of ejectment, in [**451 1831, for the recovery of a tract of land, in the county of Hamilton, in the state of Ohio. On the trial of the case, in order to establish their title, they gave in evidence to the jury, the proceedings in an attachment against Seth Cutter, in the county court of Hamilton county, commenced in 1807, under which, the tract of land in the ejectment, was sold, in 1808, and the sale returned by the auditors appointed by the court to make the same, on the 16th day of April 1808. The sale was confirmed by the court, at August term 1808 ; and according to the provisions of the attachment law of the state of Ohio, the auditors had previously made a deed to William Woodward and William Foster, the purchasers of the property sold. This deed was executed on the 28th day of May 1828, to Woodward and Foster, who, on the same day, conveyed the same to William Stanley.

The defendants in the ejectment claimed title to the premises, which were in their possession, under Seth Cutter. They insisted, that the proceedings in attachment did not divest Seth Cutter of his title to the land ; but the court instructed the jury otherwise. The jury gave a verdict in favor of the plaintiffs. To the judgment of the circuit court on the verdict, the defendants below prosecuted this writ of error.

The record of the county court of Hamilton county, in the attachment against Seth Cutter, and the opinion of the circuit court upon the title derived under it by the plaintiffs below, were brought up by a bill of excep-

¹ And see *Cocke v. Halsey*, 16 Pet. 71; *Id.* 308; *McNitt v. Turner*, 16 Id. 352; *New Shriver v. Lynn*, 2 How. 48; *Grignon v. Astor*, *Id.* 819; *Haff v. Hutchinson*, 14 Id. 566; *Nations v. Johnson*, 24 Id. 195; *Gray v. Brigardello*, 1 Wall. 637; *Cooper v. Reynolds*, 10

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tions. The whole proceedings in the attachment are stated fully in the opinion of the court.

The case was presented to this court, on printed arguments, by *Caswell* and *Chester*, for the plaintiffs in error; and by *Fox* and *Chase*, for the defendants. *Sergeant* also delivered to the court a written argument for the defendants in error.

The printed argument of the counsel for the plaintiff in error, presented for the consideration of the court, was as follows: 1. Were the proceedings in attachment sufficient to divest the title of Seth Cutter to the premises in dispute? 2. Was that title, by such proceedings, and by the deed made, vested in Samuel Foster and William Woodward? The plaintiffs in error hold the negative on both these points.

*452] *The powers of courts are of two kinds: ordinary and extraordinary. The first are those general powers of adjudicating between parties, the defendant being within reach of their process, upon matters within the general cognisance of the tribunals, as established by law. The constitution or laws establishing the respective courts of the Union or the states, define, by marked boundaries, these general powers, as distributed to the different courts, and fix the limits of their respective jurisdictions. Within these boundaries, their power is exercised according to their own discretion and judgment of the law, and their adjudications are conclusive upon the rights of the parties, unless the case be regularly brought under the review of an appellate tribunal. The constitutions of judicial tribunals are to be carefully distinguished from those laws which are made for the enlarging, defining or circumscribing the rights and liabilities of individuals constituting the community, over which the powers of legislation are exercised. From the former, a court derives its existence, its mode of being, and the essential qualities of its nature. They confer upon it its powers, define its jurisdiction, and limit its capacity. In expounding these fundamental laws, in which its judges have, if not a personal, yet an official interest, it can claim no right to bind the conscience or control the judgment of any other tribunal, not subordinate, before which the question may arise, whether its construction and judgment were right or wrong. It must be resolved, by looking at the law itself.

The extraordinary or special powers conferred upon courts are of the same nature. Relating, like them, to their own power and jurisdiction they have no exclusive right to judge of them, so as to silence the judgment of other tribunals, not subordinate, when the question is whether the power exercised has been conferred. In other words, the exercise of a power by a court, does not prove the rightful existence of the power. And when a special power is conferred, to be exercised in a certain mode, it is equally competent for another tribunal to consider whether the power has been exercised in the mode prescribed; for, in such case, the mode is an ingredient essential to the power, constituting, indeed, a condition on which the power depends. In such case, the act is binding, or nugatory, as it pursues the mode, or is done in disregard of it. And the record, to bind the rights of the parties, must show that the power has been exercised in strict conformity to the mode prescribed. It is not sufficient, that *the mode has *453] been pursued in three out of four, or nine out of ten of its parts; it

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must be wholly pursued, to make the act valid. If twenty things are required by the law to be done by the court, in exercising such special power, these being specially required, must not only be done, but specifically appear on the record to have been done. The omission of one is fatal; and a court before which the adjudication shall be collaterally brought, cannot hold a right to be vested, or a title to be divested, by a record showing such an omission. See *Rose v. Himely*, 4 Cranch 241; *Griffith v. Frazier*, 8 Ibid. 9; 3 Johns. Cas. 108; *Rex v. Croke*, Cowp. 26 (Lord MANSFIELD's opinion, p. 29); 1 Burr. 877; 4 Ibid. 2244. In *Smith v. Rice*, 11 Mass. 510, it is held, that although the court have jurisdiction of the subject-matter, yet if the proceedings are not according to the course of the common law, and the statute be not strictly followed, the judgment is absolutely void, and vests no right. See also, *Davol v. Davol*, 13 Mass. 264.

The statute respecting attachments, in force at the time of these proceedings, will be found in 1 Chase's Stat. p. 462, passed in 1805: § 15 of this statute enacts, "that the goods, chattels, lands, tenements, rights, credits, moneys and effects, of persons residing out of the state, shall be liable to be attached, taken, proceeded against, sold, assigned and transferred, for the payment of their debts, in the same manner, as nearly as may be, as is herein provided with respect to other debtors; provided, that instead of the oath or affirmation hereinbefore provided, the applicant for such writ of attachment, his agent or attorney, shall make oath or affirmation that the defendant is not, at that time, resident within the state, as he verily believes; and that the said defendant is justly indebted to him in a sum of money, specifying as nearly as he can, the amount of his demand or balance; provided also, that no judgment shall be entered by virtue of this section, until notice for the space of three months shall be given in one of the newspapers published in this state, of the issuing of such attachment, and at whose suit, against whose estate, from what court the same issued; and that unless the defendant in attachment shall appear, give special bail, and receive a declaration, judgment will be entered, and the estate so attached sold for the benefit of the creditors."

For the other provisions regulating foreign attachments we are referred to those parts of the statute relating to domestic attachments. [*454 The first section relates to the oath to be taken by the plaintiff, the substance of which is changed, in the section just quoted, to accommodate it to the case of a non-resident debtor. It provides before what officer the oath may be taken; that it shall be taken and filed with the clerk of the court; and that any writ of attachment issued before the oath or affirmation be so taken and filed, shall be quashed on motion: §§ 2, 3, 4, 5, 6 and 7 relate to the mode of executing the writ, garnishees, costs, trying the right of property, &c.: § 8 is in these words:

"The court, at the return of such writ of attachment, shall appoint three discreet persons to audit and adjust the accounts and the demands of the plaintiffs, and so many of the creditors of the defendant in attachment, as may have applied to the court, or shall apply to the auditors for that purpose, before they shall have closed their report; which report shall be made in writing, signed by the said auditors, or any two of them, and shall be returned to the court from which such writ of attachment issued, and at the third term, including the term to which the writ of attachment was returned,

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final judgment shall be entered on such report ; provided, that the defendant shall have been called three times, at each of the said terms, and have made default, and those defaults shall have been entered by the clerk," &c. section 11 of this act is the last to which we deem it necessary to call the particular attention of the court. It authorized the auditors, by virtue of an order from the court, to sell the lands and tenements, &c., attached ; "provided, that notice of such sale shall be set up in writing, at three of the most public places within the county, at least, or be advertised in a newspaper, published in the county, for the space of fifteen days, at least, prior to such sale ; nor shall any sale be made of such lands and tenements, in less than twelve calendar months, from the return of such writ of attachment," &c.

We will present at one view the requirements of the statute to which we ask the attention of the court. 1. The plaintiff must make and file an affidavit, before any writ of attachment can issue. 2. This affidavit must state that the defendant is not resident within the state, as plaintiff believes.

3. An advertisement, minutely described in the statute, must be *published in some paper of the state, three months before any judgment can be rendered. 4. No judgment can be rendered against the defendant, until the third term, and then only on the express condition, that at each of said terms, he shall have been three times called, and have made default, and those defaults shall have been entered by the clerk. 5. No sale of lands can be made by the auditors, in less than twelve months from the return of the attachment. 6. The auditors are required to give at least fifteen days' notice, by advertisement, of the sale.

None of these requirements of the statute appear to have been complied with. The clerk has certified that the transcript contains all the matters of record, or on file in the cause. There is no affidavit or mention of an affidavit, in the transcript. The court of common pleas had no jurisdiction of the matter, until this was made and filed. The defendant was not within the jurisdiction of the court, or liable to its process, and his property could only be proceeded against and subjected to sale, upon the making of such an affidavit or affirmation as is prescribed in the statute. Any process, and all the proceedings founded upon process of attachment, are a nullity, without this. There is no room here for presumptions ; where title depends upon a record, nothing is to be presumed, which does not appear in the record. Proceedings of courts can be shown only by their records, and what the law requires to be recorded, cannot be presumed to exist, where the record does not show it. The writ issued recites, that whereas, the plaintiff had sufficiently testified. In what manner he testified, whether by a verbal oath, or assertion without oath, does not appear. It does appear, that it was not in the manner required, for then the oath would have made a part of the record. And it is not recited in the writ, that he had even testified, that the defendant was not then resident within the state. The clerk himself seems to say, that he was not a resident. The language is, "has sufficiently testified that Seth Cutter, who is not now a resident of the state." We conceive, that the warrant of this affidavit is fatal to all the subsequent proceedings, and that any judgment rendered in the cause was a nullity.

The next defect in the record is, that is does not appear, that the attach-

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ment was advertised, according to the statute. This was the mode required by the statute for perfecting service; it was necessary *to make Cut-
ter a party to the cause; to make the proceedings binding upon him. [*456
Without such a notice, his rights could not be affected by any judgment rendered in the cause. This matter is settled by the supreme court of Ohio, in *Cohowell v. Bank of Steubenville*, 2 Ohio 229, and in *Taylor v. McDonald*, 4 Ibid. 155-6. Chief Justice MARSHALL, in the case of *The Mary*, 9 Cranch 144, says, "it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him." The only mode in which implied notice could be given the defendant, in attachment, is by publication. No publication was made; no actual notice pretended—of course, the party was not bound by the judgment, and his title to the land was not divested.

The court was authorized to give judgment at the third term, only on the express condition, that, at each of the three terms, the defendant had been three times called, and had made default, and these defaults were entered by the clerk. At the first term, he was regularly called and defaulted, according to the statute; at the second term, there is no entry of calling, or a default; at the third term, he was called, but whether once or more, does not appear. The court, in this state of the record, had no right or power to give judgment, and it is for this reason a nullity.

Twelve calendar months must, according to the terms of the statute, elapse, after the return of the writ, before any sale could be made of the lands of the defendant. It does not appear, either from the return of the auditors, or their deed, when the sale was made. The order for sale, such as it was, was issued long before the expiration of the twelve months, and, of course, before the land was liable to sale. It is submitted, that the court could make no order of this kind, before the end of the twelve months. They must wait until the land is liable to sale, before they can order it to be sold. That order is *in praesenti* (not limited to a future time), to do that which there was no rightful authority to do. Such an order seems to us a nullity. At least, if made within twelve months, it should appear not to have been executed till after their expiration.

The auditors are required to give at least fifteen days' notice of the sale. This does not appear to have been done. It is not so stated in the deed; no proof of the fact is adduced. These auditors were *not regular judicial or ministerial officers; they acted neither under the sanction of [*457
an oath of office, nor had they given any security to which the defendant could resort in case of injury. The power conferred must be strictly pursued; no presumptions can be made in their favor. That it would not be necessary, to sustain a title acquired under a sheriff's deed, to show that he had obeyed the law in the manner of making his sale, in every respect, may be admitted. But it by no means follows, that the same favor is to be shown towards a title claimed under the exercise of a special power, conferred on individuals. All the reasons are against it.

We have not thought it necessary to remark upon many things contained in this record, which, to say the least, appear to us singular. Whether the persons who adjusted the accounts against the defendants were auditors or referees, seems to be left in doubt. The nature of the claims against the

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defendant, by what evidence supported, or how ascertained, does not appear. The order to sell, issued to the auditors, does not appear. For aught that appears in the record, the sale was private, and without notice.

2. Admitting that the proceedings in attachment would have been otherwise sufficient to divest the title of Seth Cutter, the deed is not sufficient to vest that title in Samuel Foster and William Woodward. So far as we can conjecture from the return of the auditors, the land in question was sold to William Stanley. To him alone could the auditors convey. The return of the auditors is necessary to sustain the deed; without this, it cannot be pretended, that the deed would be valid. The subsequent conveyance by Foster and Woodward to Stanley, does not alter the principle. They could convey no title which was not vested in them; if none was vested in them, none passed by their deed. It is not even shown or pretended, that Foster and Woodward were, by any act of Stanley, substituted in his place as purchasers; they stand entirely unconnected with the record. In the case of *Den v. Lambert*, 1 Green (N. J.) 182, this point is decided. There, one individual was reported as the purchaser, and the deed was made to him and another. The question for the court was, whether such a deed vested any title; it was decided, that it did not. If that was a correct decision, it is conclusive on this point.

It will probably be urged for the defendant in error, against the views we have presented of this case, that however erroneous the proceedings of *458] the court of common pleas may have been, yet they *cannot be inquired into collaterally; that their judgment is binding, until reversed by an appellate tribunal. This doctrine is true, as to matters within the ordinary jurisdiction of courts, where the proceedings are according to the course of the common law; but not so in this case. The defendant was not within their jurisdiction; he could only be affected through his property lying within that jurisdiction. The court could only take jurisdiction, in a certain state of facts, which must be made to appear, by an affidavit filed. They could subject the property of the defendant only by a particular mode of proceeding. He was not a party in court, and the plaintiff took judgment against him at his peril. The purchaser was bound to inquire into the power of the persons acting as auditors, and the means by which the property was subjected to sale. The whole record is necessary to support their title, and to the whole they should have looked; the rights of the party could only be affected by strictly pursuing the law. *Colwell v. Bank of Steubenville*, and *Taylor v. McDonald*, before cited.

But in relation to inquiring into the regularity of these proceedings collaterally, the legislature of Ohio has settled the question, so far as legislative construction can settle it. By the act of February 4th, 1813 (2 Chase's Stat. 795, § 8), reciting, that whereas, it had been doubted, &c., and for removing such doubts, it was enacted, "that any person, in any suit or proceeding founded upon, or in which it may be necessary to show any such process (in attachment), proceeding or judgment, may be permitted collaterally to impeach the same, and to show any irregularity therein, or any deviation from the authority conveyed by the said 53d section, or by the above-recited act" (the act allowing and regulating attachment). If it be objected that this act was passed after the title is claimed to have vested, the case of *Watson v. Mercer*, 8 Pet. 88, is an answer to such objection.

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It is true, that this clause in the act of 1813, was afterwards repealed, with the whole act. But it cannot but be obvious, that the reason why it was not re-enacted, was, that the reason given for passing it no longer existed; that the doubts in relation to the matter had ceased. In *Humphrey v. Wood* (Wright 566), the court say, "these proceedings (in attachment) being *ex parte* and *in rem*, *the statute must be strictly pursued, or [**459] no right is acquired under it;" and the proceedings were declared to be void, not voidable. In *McDaniel v. Sappington* (Hardin 94), the court hold, that the remedy by attachment being in derogation of the common law, the statute giving the remedy ought to be strictly pursued in all its provisions.

These are the reasons for our respectfully insisting, that the circuit court erred in giving judgment, on the point reserved, for the plaintiff. And unless there be something in the name or essence of a court which makes its *ex parte* proceedings binding upon the rights of individuals, despite of all the provisions of a statute vesting it with whatever power it has over the subject-matter—unless, because it is authorized to do one thing, it may do all things—unless, because it has power to do a particular thing, in a particular mode, it may do the same thing in any other mode, according to its own pleasure—unless it can, secretly, by the aid of irresponsible agents, held to their duty neither by oath or obligation, dispose of the property of citizens of other states according to its uncontrolled will—we think, we may rightfully ask for the reversal of the judgment of the court below.

Fox, with whom was *Chase*, in their printed argument, argued for the defendants in error, as follows:—The objections urged below, and which we anticipate will be urged in this court against the validity of the proceedings in the attachment-suit, taken in the order in which they arise, as follows: 1. Because no affidavit of non-residence appears in the record. 2. Because there is no evidence of the pendency of the suit having been advertised three months. 3. That the record does not show that the requisite defaults have been entered. 4. That the deed ought not to have been made to *Woodward* and *Foster*, the sale having been made to *Stanley*.

1. As to the first objection, we say, the statute does not require that the affidavit should be made a part of the record; all that is required by the law is the filing of the affidavit with the clerk. The affidavit ought certainly to be filed, but it is no more necessary that such affidavit should be recorded, than that an affidavit to hold to bail, or the attorney's *præcipe* ordering a writ in a cause, should be recorded, or that proof of such an affidavit having been made, should appear in the record. Indeed, in an ordinary suit, the writ forms no necessary part of the record, unless required to be recorded by *express statute. Until within a few years, the writ is not to be found in the records of judicial proceedings in Ohio. But in the present case, the record does show that an affidavit was filed, for it is recited, that the plaintiff "has sufficiently testified to the judges of our court of common pleas, that Seth Cutter, who is not now residing in the state, is indebted," &c. Here it is shown, that a affidavit had been made, and we presume, that this recital must be held sufficient, at this late period, even if the court should consider record evidence necessary to prove that an affidavit had been made.

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2. The next question arising in the cause, is, whether it is essential, that in an attachment-suit, where the article seized is substituted for a personal service of process, the record must show that the proper advertisement of the pendency of the suit has been made. We suppose, it not necessary to the validity of the judgment, that any such advertisement should in fact be made, but at all events, we insist, that no evidence of the fact of advertisement having been made, need appear in the record. We suppose, in this, as in all other proceedings *in rem*, the seizing of the property by virtue of process issued from a court having authority to issue the writ, vests in the tribunal from which the process issued, a complete jurisdiction over the thing or property seized. If we are right in this position, it follows, we suppose, as a matter of course, that irregularities or errors in the subsequent proceedings of the court, can only be corrected by the courts of the state.

We insist, that the issuing of the writ of attachment and seizing the real estate, by virtue of that writ, gave to the court of common pleas of Hamilton county, complete jurisdiction of the property seized : 1st. Because, the statute declares (§ 2), "that property so attached shall be bound from the time of levying such attachment." 2d. Because (§ 3) the property from the time of attachment, is to "remain in the care and safe-keeping of the officer, to abide the judgment of the court." 3d. Because (§ 8) at the return-term of the writ, the court are authorized to refer the matters of account, &c., to the auditors to be adjusted. 4th. Because (§ 11) the court are authorized to direct a sale of the personal property attached, at any time after it is seized, if it be of a perishable nature. 5th. Because the death of [§ 461] the defendant is not to abate the *suit, but the right of the plaintiff is referred to the time of suing the attachment. These acts could not be authorized to be done, unless upon the supposition, that the court, by virtue of the seizure, had complete jurisdiction of the suit, and of the parties thereto, so far as the disposition of the property attached was concerned. This is also agreeable to the analogous proceedings in the courts of admiralty and exchequer.

In admiralty causes, it is a universal principle, that the seizure of property by an officer, acting under authority, vests the right in the sovereign, and authorizes his courts to proceed and inquire, whether, under the law, the property seized has been forfeited, and to adjudge to whom it belongs, and how it shall be disposed of ; and all sentences, judgments and decrees, affecting the property so seized, are conclusive upon all the world, as to the right and title to the thing seized from the time of seizure. 4 Cranch 278 ; 1 Paine 626. On the seizure of the property, the jurisdiction of the admiralty courts attaches, and the property is subject to the decision in the cause. 4 Cranch 296 ; 1 Phil. Ev. 273 ; 12 Serg. & Rawle 289 ; 1 Paine 626 ; 3 Binn. 220 ; 5 Cranch 184.

If, then, the court had jurisdiction of the cause, the omitting to publish the pendency of the writ, did not divest the court of its jurisdiction. The court, undoubtedly, might have refused to have given judgment, and, indeed, ought not to have given judgment, until the advertisement had been made, and we must suppose the court did require the evidence of such publication ; as we are not to presume the judges neglected, or erred in the discharge of their duties. But suppose, the court did not require any proof of such publication having been made ; suppose, that they were satisfied of

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its having been made, from their own personal knowledge, such as their having read the notice in the newspaper, and admitting, the court ought to have required other evidence of the fact; all that can be said in relation to the matter is, that the court erred, but the error of the court cannot affect the validity of the judgment. The purchaser of property is not responsible for the errors of the court or of the parties. Nor can the errors of the court of common pleas be inquired into by this court. This court, so far as the judgment of the court of common pleas of Hamilton county is concerned, is a foreign court, and as such cannot notice the irregularities of the Hamilton county courts. The regularity or irregularity of the proceedings of our own court is an internal regulation *of the state of Ohio, and as such, must be expounded by the courts of the state. Foreign courts can- [*462 not notice the errors of state courts. 4 Cranch 294; 1 Paine 621. "Where judicial proceedings are merely irregular, the courts of the country pronouncing the sentence, are the exclusive judges of that irregularity, and their decision binds the world." 4 Cranch 278. The case of *Kempe's Lessee v. Kennedy*, 5 Cranch 173, we conceive conclusive on this subject. In that case, the court held, that whether the inquest which was substituted for a verdict "did or did not show that an offence had been committed, was a question which the court in New Jersey was competent to decide. The judgment it gave is erroneous, but it is a judgment, and until reversed, cannot be disregarded." The same principle is recognised, 11 Mass. 229. So, in 12 Serg. & Rawle 289, it was held, that money being attached in Louisiana, "the judgment of the courts there, touching the disposition of that money, was conclusive. The thing attached, being in Louisiana, was subject to the jurisdiction of her courts. By what law it was to be governed, "it was for the judges of those courts to decide; and we presume they would decide by their own laws."

3. The third objection is, that the statute requires the defendant should be called, for three successive terms, and defaulted, and entries of such default entered of record, and that the record offered in evidence does not show that these defaults were entered. This, like the other objections, is one which could only be taken advantage of by writ of error, which could only be prosecuted in the state court. It does not affect the validity of the judgment. There is no doubt, the defendant ought to have been called three times, at three successive terms, and that an entry of such calling ought to have been made. But after admitting all this, the judgment still remains good, until reversed. The plaintiffs in error, in order to sustain their objection, by their course of argument, destroy all the well-settled distinctions between void and erroneous judgments. The least irregularity—the smallest error in the judgment of the courts, if sufficient to reverse the judgment in a superior court, is also sufficient, according to this view of the case, to render it null and void. If this judgment was a valid judgment, until reversed or set aside by a superior tribunal in Ohio, it is binding and valid everywhere. And being a *proceeding *in rem*, not against the person; the seizing of the property being tantamount to personal service in a personal action; the court had jurisdiction of the matter, and that is all the law requires to make the judgment valid. [*463

4. The last objection, as we understand it, is, that the deed is not made to the person who was returned as the purchaser at the auditors' sale. It

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is true, that the auditors returned that the land in question "was sold to William Stanley, for \$170;" but this return is not conclusive on the purchase: the deed made to Woodward and Foster, is as strong evidence of the sale having been made to those persons, as the return to the court is of its having been made to Stanley. But we contend, it is immaterial, whether the sale was made to Stanley, or to Woodward and Foster. If the sale was to Stanley, he was equitably entitled to a deed for the property sold, and he was equitably entitled to direct the deed to be made to another. The statute does not require the auditors to make a deed to the purchaser. By the 11th section, they are authorized to sell and convey the lands. But to whom they are to make the deed, is left to be decided by the principles of law and the agreement of the parties. The auditors, perhaps, could not be compelled to convey to an assignee of the purchaser, unless by the court of chancery; but if the purchaser requested the auditors to make the deed to Woodward and Foster, and the auditors did so, we do not perceive that the rights of Cutter were in any way affected by the arrangement. The equitable title to the lot was vested in Stanley, by the purchase, and the right would have been enforced specifically by a court of equity, either on the application of Stanley (if he had parted with his interest) or of his assignee. The deed to Foster and Woodward shows that Stanley was satisfied with the doings of the auditors, or he would not have received a deed from Woodward and Foster. The latter made to Stanley a warranty deed, and both deeds bear date on the same day; it is evident, therefore, that Stanley, Woodward and Foster, the only persons interested in this matter, were perfectly agreed as to the manner of making the deeds; and as no law has been violated, we suppose the deeds are valid.

To these views of the matters in controversy, *Chase* subjoined an argument in which he contended: *1st. It appears from the record and ^{*464]} the law, that the proceedings in attachment were had before a court of competent jurisdiction. 2d. That in the exercise of this jurisdiction, a judgment was rendered and an order made; in virtue of which the land in controversy was properly sold. 3d. That the judgment and order so made, having never been reversed, remain valid and in full force; and cannot now be collaterally questioned. He cited, *Kempe's Lessee v. Kennedy*, 5 Cranch 173; *Ohio Forms and Practice*, 126, 359; *Hartshorn v. Wilson*, 2 Ohio 28; 6 Ibid. 268; 2 *Chase's Statutes*, 712; 5 *Ohio* 500; 1 *Chase's Statutes*, 163, 164, 683, 795, 972; 5 *Ohio* 500, *per Hitchcock*, Chief Judge; *Allen's Lessee v. Parish*, 3 *Ohio* 190; *Ludlow's Heirs v. Wade*, 5 *Ibid.* 501; *Ludlow's Heirs v. McBride*, 3 *Ibid.* 257; *Ludlow's Heirs v. Johnston*, *Ibid.* 561; *Dabney v. Manning*, *Ibid.* 325; *Cohowell v. Bank of Steubenville*, 2 *Ibid.* 229; *Cowden v. Hurford*, 4 *Ibid.* 183; *Taylor v. McDonald*, *Ibid.* 154; *Humphrey v. Wood*, *Wright* 566.

Sergeant, also for the defendants in error, argued in writing:—

1. That the sale which is questioned in this case, was made in the year 1808, about twenty-eight years ago. It was made under a judgment of a court of competent jurisdiction, and in conformity to that judgment. The deed was duly acknowledged, and was recorded in June 1808. The judgment stands in full force, and unreversed. The objections made after this great length of time are, that certain things required by law in the course of

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the proceeding, do not appear to have been closed. It is not proved, that they were left undone. The question then is, whether a party, after more than a quarter of a century, is bound, affirmatively and positively, to prove, in support of his title, that not only the court, but every officer and every person employed by the court, did what the law required to be done ; or else to lose his land. In such a case, presumption stands in the place of proof. The court will presume everything to have been rightly and regularly done. This is due to the tribunal. Its conclusions are presumptive evidence that the right steps have been taken. This presumption *arises immediately ; it is strengthened by time ; and after so many [*465 years, is indispensable to justice. How is it possible now to prove affidavits or advertisements ?

2. The want of an affidavit is supposed to go to the jurisdiction of the court. If this were so, the plain answer would be, that it does not appear, that there was no affidavit. The presumption is, that there was an affidavit ; and after so great a length of time, it is irresistible and conclusive. But this is not the law. By the first section of the act of Ohio, it is provided, that if the clerk issue a writ, without an affidavit, "such writ shall be quashed on motion, at the proper cost of the clerk issuing the same." If there be no motion, then the writ cannot be quashed ; and if the writ be not quashed, it remains in force, and so supports the jurisdiction. The writ cannot be invalidated in any other way than this. It is a good writ, if it be not so invalidated. In this case, therefore, the writ is a good writ, and unimpeachable now, in this collateral action, even if it were certain there was no affidavit.

3. There are some remarks made in the argument, as to the time of sale, not very exact ; nor, seemingly, much relied upon. It is only necessary, in order to dispose of these remarks, that the prohibition in the act, § 11, is limited specifically to the sale. The order of sale may be before the expiration of the year. The act seems to contemplate that it shall be at the time of giving judgment. The advertisement may be within the year ; and if it announce a sale after the year, it is good. Now, here, it does not appear that the sale was within the year. That would be enough. But the evidence is sufficient to show that it was after the year. The return of sale bears date the 16th of April, being eleven days after the end of the year. The reasonable presumption, according to the usual course of such business, is, that this was the date of the sale, or as soon after as possible.

4. Upon the more general and very important question, whether these proceedings are examinable in a collateral suit, I wish to add a reference to the case of *Thompson v. Tolmie*, 2 Pet. 157. The principles are there very fully and clearly stated ; and that judgment is deemed to be decisive of the present case. It will be perceived, that the counsel on both sides refer to cases in Massachusetts, as maintaining contradictory doctrines. They do seem to be opposed to each other. But in *Heath v. Wells*, 5 Pick. 140, the former cases are reviewed and reconciled. Where the *proceedings [*466 were held void, it was because there was wanting what was necessary to vest jurisdiction. The indispensable pre-requisite did not exist. Perhaps, too, the courts of Massachusetts were more liberal, because there was no opportunity to review by writ of error. It is not necessary to examine what weight ought, in justice, to be allowed to this consideration.

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Such motive for enlarging or relaxing the ordinary rule is not to be found in this case. Judgments in attachment were, and are, examinable on error in Ohio. And this leads to a remark upon the cases cited by the counsel of the plaintiff in error. They are all, without exception (that in Wright 566, included), writs of error. No instance of impeaching the proceedings collaterally, has been shown. The distinction is a familiar one, and it is highly important. Writs of error are limited in point of time. Collateral suits are almost without limitation.

Still more, reversal of a judgment, on error, does not affect the title of a purchaser. The successful party does not go for the land, but for restitution of what was recovered from him by his adversary. The collateral suit seeks to recover the land, leaving the money in the hands of the adverse party, at the expense of the purchaser, who thus becomes the victim. The creditor gets his money, which is not unjust. The debtor is released, without payment, and an innocent purchaser, invited by judicial proceedings, is made to pay. Duly encouraged, such a principle would soon lead to piratical adventures under color of law.

Caswell and *Chester*, in reply to the argument of *Fox* and *Chase*, denied, that the proceeding by a foreign attachment, under the law of Ohio, was a proceeding *in rem*. They argued, that a foreign attachment is a proceeding against a debtor for the recovery of a debt due to a plaintiff in attachment. The debt does not grow out of the property attached ; there is no offence committed or duty neglected in regard to it, to form the basis of the proceeding. The particular property seized is not in default ; no offence has been committed by means of it, or in relation to it ; there is no debt constituting a lien upon it ; or in other words, it is not itself a debtor. No question is agitated or put in issue in relation to the property. The issue to be tried, if an issue be made up, is, whether the person *defendant is [467] debtor, and the amount of the debt ; and whether he is non-resident so as to be within the provisions of the statute. There is nothing in this proceeding in common with proceedings *in rem*.

In answer to the position, that if the common pleas of Hamilton county had jurisdiction of the attachment-suit, this court cannot look at their proceedings, it was urged, that the power delegated by a statute can be exercised in no other mode than that pointed out by the statute, and no presumption in favor of proceedings in a foreign attachment, will be sustained, where the purchaser under them was never in possession, and where suit is brought after the lapse of twenty years.

They denied the arguments on the cases cited by the counsel for the defendants in error ; and also the construction of the statute of Kentucky relative to sales made by administrators.

In conclusion, they stated : We trust we have satisfactorily shown that the grounds assumed by the defendants in error are not tenable ; and that they are not sustained by the authorities cited in support of their positions. Especially, we think it is manifest, both from authority and upon principle, that a general jurisdiction of a class of cases, coming under one general head, does not necessarily give or infer a jurisdiction over every particular case, or an unlimited power in relation to each case. See *Bank of Hamilton v. Dudley's Lessee*, 2 Pet. 492, and particularly, pages 523-4.

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That a power, even in a court, to do an act in a particular mode, does not give the power to do the act in any other mode. That when there is a power of jurisdiction, upon the condition of something being first done, the record must show that the thing required was done. That when, by the legislative act giving power over the subject-matter, the court is prohibited from rendering judgment, until certain pre-requisites have been complied with, the judgment is not merely voidable, but a nullity, unless these pre-requisites, being matters proper for the record, shall, by the record, appear to have been performed; most certainly is this the case, if the statute expressly prohibit any final action or judgment, until after these shall have been placed on the record. We think we have shown, that a foreign attachment is not such a proceeding *in rem*, as comes within the principles laid down by admiralty courts in relation to parties and notice in such proceedings; that in all *ex parte* proceedings, where there has been no actual notice to the person interested, he may avail himself collaterally of every advantage which he would have on a writ of error, for error in law; that where a statute requires notice or service of any kind, upon one who is to be thereby made a party to a suit, he is not bound, nor his property divested, by any proceedings or judgment, unless such notice or service be shown, or may clearly be inferred, from the record; that a jurisdiction or power is not acquired over the rights of a person, who is without the jurisdiction of the court and of the state, merely by the issuing of a writ against his property, without a compliance with any of those essential requisites on which, by the statute, the right and power of the court first to entertain the cause, and afterwards to proceed in it to judgment, depends; and finally, that in all *ex parte* proceedings, the plaintiff takes the judgment at his peril, and purchasers must, at their peril, look to the whole record of the cause.

And if these, or any of these propositions be sound, then we have certainly brought our case within it, and are entitled to a reversal of the judgment below; for we have shown: 1. That by the statute, the plaintiff must make and file an affidavit, before any writ could issue; and no such affidavit was made or filed. (The defendant's counsel err when they say such an affidavit makes no part of the record.) 2. That this affidavit must state, that the defendant is not resident within the state, as plaintiff believes. No such affidavit was made or alluded to, or any intimation given that such a thing was testified to. 3. That to give notice to the defendant, an advertisement, the substance of which is prescribed in the statute, must have been published in some paper of the state, for three months before the court was vested with any power to give judgment, and no such notice is mentioned in the record; and there is nothing in or out of the record from which it can be inferred. 4. That no judgment could be rendered against the defendant, until after three callings, at each of three terms of the court, and three defaults entered on the record by the clerk; and that the power to give a valid judgment depended on this, as a condition precedent. The callings and the defaults do not appear as required. 5. That no power to sell the land in question, and, of course, no power to order the sale of the land, existed till after the lapse of twelve months from the return of the attachment; and the *order was issued long before the lapse of the twelve months; and there is no evidence that the auditors waited [^{*468}]

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for the expiration of the time, or when, or where, or how, they sold. 6. That the auditors were required to give at least fifteen days' notice, by advertisement, of the sale; and it is not shown or pretended, either by the deed or otherwise, that such an advertisement was made. 7. That the return shows a sale to one man, and a conveyance made to others, not in any mode connected with the record.

From the time of the sale to the present day, the defendant in attachment, and those claiming under him, have been in the undisturbed possession of the land, now, at this late day, brought into dispute; and viewing the decisions of the state courts, and the principles of law, as we do, we most cheerfully unite in the sentiment and opinion so happily expressed by the defendant's counsel: "that the judgment of this court will accord with the course of decisions in the state courts, and will tend not to impair, but to establish confidence; not to excite, but to repress the spirit of speculation in litigation; not to destroy, but to fortify the security of titles."

BALDWIN, Justice, delivered the opinion of the court.—This case comes up by a writ of error from the circuit court for the district of Ohio, to reverse a judgment in an action of ejectment obtained by the defendants against the plaintiffs in error. The sole question in the court below was the validity of a sale of the premises in controversy, under a judgment of the court of the court of common pleas of Hamilton county, Ohio, in a case of foreign attachment, rendered against Seth Cutter, in 1808, at the suit of Samuel Foster. By the record in that case, it appears that the writ was returnable to April term 1807. It recited, that the plaintiff had sufficiently testified to the judges, that the defendant, who is not residing in the state, is indebted to the plaintiff, &c. The sheriff returned the writ, with an inventory of the property attached by him; in which was included the property in question, with an appraisement thereof. At the April term, the defendant was three times called, and made default; whereupon, the court appointed auditors to report at August term following: the order was then continued to December term, when the auditors made a report, finding a debt of \$267 due the plaintiff. The court then rendered judgment on the report, and ordered the property attached to be sold agreeable to law. An order of *sale was accordingly issued to the auditors, who, at the April term 1808, to wit, on the 16th of April, reported that they had sold the premises to William Stanley for \$170; on an inspection of which, the court granted judgment of confirmation thereof. On the 28th of May 1808, the auditors made a deed to Samuel Foster and William Woodward, who, on the same day, conveyed the same to William Stanley; under whom the lessors of the plaintiff claimed by sundry mesne conveyances. The consideration of the deed from the auditors to Foster and Woodward was \$170, the same as from them to Stanley; but they gave in their deed a covenant of seisin, of power to sell, and general warranty. The defendants were in possession, claiming title under Seth Cutter, the defendant in the attachment, as whose property the land was sold. The case has been submitted on printed arguments; which present a full and able view and discussion of the points arising in the cause.

On comparing the record of the proceedings on the attachment, with the provisions of the act of 1805 (Chase's Ohio Laws, 462, &c.), the acts of

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the court in all the course of the cause appear to be in conformity therewith, except in the following particulars, on which the objections to the validity of the sale are founded : 1. By the first section, it provides, that an affidavit shall be made and filed with the clerk, before the writ issues, and if this is not done, the writ shall be quashed, on motion ; no such affidavit is found in the record. 2. The 15th section directs three months' notice to be given, by publication in a newspaper, of the issuing of the attachment, before judgment shall be entered ; the 11th section also prescribes, that fifteen days' notice of sale shall be given by the auditors ; neither of which appears by the record to have been done. 3. By the proviso to the 8th section, the defendant must be three times called, at each of the three terms preceding judgment, and make default, which defaults shall be recorded by the clerk ; no entry is made of such default at the December term 1807. 4. By the 11th section, the auditors are prohibited from selling, till the expiration of twelve months from the return of the writ, whereas, the order issued before ; and it does not appear when the sale was made. 5. The return of the sale by the auditors shows a sale to one *person, and a deed to others, not [*471 in any mode connected with the record.

There is no provision in the law, that if the several acts therein directed to be done are omitted, the sale or any other proceedings under the attachment shall be deemed void ; but by the 13th section, it is declared, that every sale and conveyance made by the said auditors, or any two of them, by virtue of the authority herein granted, shall be as binding and effectual, as if the same had been made by the said defendant, prior to the service of the said attachment.

It is contended by the counsel for the plaintiffs in error, that all the requisitions of the law are conditions precedent ; which must not only be performed, before the power of the court to order a sale, or the auditors to execute it, can arise, but that such performance must appear on the record. The first part of this proposition is the true meaning of the law of Ohio ; the various acts required to be done, previous to a sale, are prescribed by a proviso, which in deeds and laws is a limitation or exception to a grant made or authority conferred ; the effect of which is, to declare, that the one shall not operate, nor the other be exercised, unless in the case provided. By the 11th section, the auditors are directed, by virtue of an order of the court, to sell and convey the lands attached, provided they give notice ; notice then is the condition, on the performance of which their duty and power depend ; and the act must be done, to make the execution of the power consistent with the law.

But the provisions of the law do not prescribe what shall be deemed evidence that such acts have been done, or direct that their performance shall appear on the record. The 13th section, which gives to the conveyance of the auditors the same effect as a deed from the defendant in the attachment contains no other limitation than that it shall be "in virtue of the authority herein granted." This leaves the question open to the application of those general principles of law, by which the validity of sales made under judicial process must be tested ; in the ascertainment of which, we do not think it necessary to examine the record in the attachment, for evidence that the acts alleged to have been omitted appear therein, to have been done. Assuming the contrary to be the case, the merits of the present controversy are

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narrowed to the single question, whether this omission invalidates the sale ? *472] The several courts of *common pleas of Ohio, at the time of these proceedings, were courts of general civil jurisdiction ; to which was added, by the act of 1805, power to issue writs of attachments, and order a sale of the property attached, on certain conditions ; no objection, therefore, can be made to their jurisdiction over the case, the cause of action, or the property attached. The process which they adopted, was the same as prescribed by the law; they ordered a sale, which was executed, and on the return thereof, gave it their confirmation. This was the judgment of a court of competent jurisdiction on all the acts preceding the sale, affirming their validity in the same manner as their judgment had affirmed the existence of a debt. There is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears : and this rule applies as well to every judgment or decree, rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action. Every matter adjudicated, becomes a part of their record ; which thenceforth proves itself, without referring to the evidence on which it has been adjudged.

In this case, the court issued an order of sale, agreeable to law, which having been returned by the auditors, and "being inspected, the court grant judgment of confirmation thereon." If is, therefore, a direct adjudication, that the order of sale was executed according to law. They had undoubted authority to render such a judgment ; and there is nothing on the record to show that it was not rightfully exercised. If the defendants' objections can be sustained, it will be on the ground that this judgment is false ; and that the order of sale was not executed according to law, because the evidence of its execution is not of record. The same reason would equally apply to the non-residence of the defendant within the state, the existence of a debt due the plaintiff, or any other creditor, which is the basis on which the whole proceedings rest. The auditors are equally silent on the evidence, upon which they reported that debts were due by the defendant, as on the evidence of notice and due publication ; but no one could pretend, that the judgment that the debts reported were due, shall be presumed to be false. Though the able and ingenious argument of the defendants has not been directed at this part of the judgment of the court of common pleas, the grounds of objection are broad enough to embrace it ; for in resting their case on the only position which the record leaves them, they necessarily affirm *473] the *general proposition, that a sale by order of a court of competent jurisdiction, may be declared a nullity, in a collateral action, if their record does not show affirmatively, the evidence of a compliance with the terms prescribed by law in making such sale. We cannot hesitate in giving a distinct and unqualified negative to this proposition, both on principle and authority, too well and long settled to be questioned.

That some sanctity should be given to judicial proceedings ; some time limited, beyond which they should not be questioned ; some protection afforded to those who purchase at sales by judicial process ; and some definite rules be established, by which property thus acquired may become transmissible, with security to the possessors, cannot be denied. In this country, particularly, where property, which within a few years was but

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of little value, in a wilderness, is now the site of large and flourishing cities, its enjoyment should be at least as secure as in that country where its value is less progressive. It is among the elementary principles of the common law, that whoever would complain of the proceedings of a court, must do it in such time as not to injure his adversary, by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into court, he must do it, before he submits to the process adopted. If the proceedings against him are not conducted according to the rules of law and the court, he must move to set them aside for irregularity ; or if there is any defect in the form or manner in which he is sued, he may assign those defects specially, and the court will not hold him answerable, till such defects are remedied. But if he pleads to the action generally, all irregularity is waived, and the court can decide only on the rights of the parties to the subject-matter of controversy ; their judgment is conclusive, unless it appears on the record, that the plaintiff has no title to the thing demanded, or that in rendering judgment, they have erred in law ; all defects in setting out a title, or in the evidence to prove it, are cured, as well as all irregularities which may have preceded the judgment.

So long as this judgment remains in force, it is in itself evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment ; the errors of the court, however apparent, can be examined only by an appellate power ; and by the laws of every country, a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it *by process of sale or imprisonment. No rule can be more reasonable, than that the person who complains of an injury done him, should avail himself of his legal rights in a reasonable time, or that that time should be limited by law. This has wisely been done by acts of limitation on writs of error and appeals ; if that time elapses, common justice requires, that what a defendant cannot do directly in the mode pointed out by law, he shall not be permitted to do collaterally by evasion. A judgment or execution irreversible by a superior court, cannot be declared a nullity by any authority of law ; if it has been rendered by a court of competent jurisdiction of the parties, and the subject-matter, with authority to use the process it has issued, it must remain the only test of the respective rights of the parties to it. If the validity of a sale under its process can be questioned for any irregularity preceding the judgment, the court which assumes such power places itself in the position of that which rendered it, and deprives it of all power of regulating its own practice or modes of proceeding in the progress of a cause to judgment. If, after its rendition, it is declared void, for any matter which can be assigned for error, only on a writ of error or appeal ; then such court not only usurps the jurisdiction of an appellate court, but collaterally nullifies what such court is prohibited by express statute law from even reversing. If the principle once prevails, that any proceeding of a court of competent jurisdiction can be declared to be a nullity, by any court, after a writ of error or appeal is barred by limitation, every county court, or justice of the peace in the Union, may exercise the same right, from which our own judgments or process would not be exempted. The only difference in this respect between this and any other court is, that no court can revise our proceedings ; but that difference disappears, after the time prescribed for

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a writ of error or appeal to revise those of an inferior court of the United States or of any state ; they stand on the same footing in law. The errors of the court do not impair their validity ; binding till reversed, any objection to their full effect, must go to the authority under which they have been conducted. If not warranted by the constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done *coram non judice* ; that is, by persons assuming the judicial function in the given case without lawful authority.

The line which separates error in judgment from the usurpation *475] of power, is very definite ; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity ; in the other, mere waste paper ; there can be no middle character assigned to judicial proceedings, which are irreversible for error. Such is their effect between the parties to the suit ; and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution. It would be a well-merited reproach to our jurisprudence, if an innocent purchaser, no party to the suit, who had paid his money on the faith of an order of a court, should not have the same protection under an erroneous proceeding, as the party who derived the benefit accruing from it. A purchaser under judicial process, pays the plaintiff his demand on the property sold ; to the extent of the purchase-money, he discharges the defendant from his adjudged obligation. Time has given an inviolable sanctity to every act of the court preceding the sale, which precludes the defendant from controverting the absolute right of the plaintiff to the full benefit of his judgment ; and it shall not be permitted, that the purchaser shall be answerable for defects in the record, from the consequence of which the plaintiff is absolved. Such flagrant injustice is imputable neither to the common nor statute law of the land. If a judgment is reversed for error, it is a settled principle of the common law, coeval with its existence, that the defendant shall have restitution only of the money ; the purchaser shall hold the property sold ; and there are few, if any, states in the Union who have not consecrated this principle by statute.

This great rule, established for the protection of purchasers on the faith of judicial process, will be utterly prostrated ; encouragement will be given to defendants in judgments, their heirs and privies, to take advantage of the security into which honest purchasers have been lulled, if any judicial proceeding which could stand the test of a writ of error or appeal, if taken in time, or had become irreversible directly, could be avoided collaterally. Acts of limitation become useless, if a defendant is allowed to evade them, by avoiding judgments or executions, on the suggestion of defects or omission in the record, which can be reviewed only by an appellate court ; a direct premium is held out for delaying the resort to the mode pointed out *476] by law for correcting the errors of judicial *proceedings. His debt is paid by the purchaser ; the property purchased is restored to the defendant, without any obligation to refund ; and that which was, when sold, of little value, and bought at its full price, paid to the defendant's use,

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becomes his rightful estate, when the remote out-lot has become a mart for commerce, and covered with valuable improvements. Had he brought his writ of error in time, and reversed the judgment or execution on which it was sold, justice would have been done him, by a restitution of the purchase-money ; and to the purchaser, by leaving him in the quiet enjoyment of the property purchased.

Such are the consequences of the doctrines contended for by the defendants' counsel, in their objections to the proceedings on the attachment ; none of them affect the jurisdiction of the court, or its authority to order or confirm the sale : the acts omitted to be noticed on the record are not judicial, but ministerial, to be performed by the clerk or auditors. It was a good ground for a motion to quash, or suspend the proceedings for irregularity, if they had not been done in fact ; and as the judgment was by default, perhaps, the omission to state them on the record, may have been good cause for reversal on a writ of error. But on an inspection of these proceedings collaterally, we can judicially see only what the court has done ; not whether they have proceeded *inverso ordine*, erroneously, according to the proof before them, or what they have omitted, or ought to have done. They have adjudged, that the order of sale was executed agreeable to law ; nothing appears on the record to impugn their judgment ; it must, therefore, be taken to be true in fact, and valid in law. Their order of sale was a lawful authority to the auditors to sell ; it was a full justification to them in obeying it ; it was executed in virtue of the authority granted by the law to the court, who have not exceeded their jurisdiction ; and the deed of the auditors passed the title to the premises in controversy to the purchaser.

It has not been thought necessary to review the various cases cited in the argument ; the principles which must govern this and all other sales by judicial process, are general ones, adopted for the security of titles, the repose of possession, and the enjoyment of property by innocent purchasers, who are the favorites of the law, in every court, and by every code. Nor shall we refer to the decisions of state courts, or the adjudged cases in the books of the common law ; our own repeated and uniform decisions cover the whole case, in its most expanded view ; and the highest considerations call upon us so to *re-affirm them, that all questions such as have arisen in this cause may be put at rest in this and the circuit courts. [*477

In *Blaine v. The Charles Carter*, a ship had been sold under executions issued within ten days after judgment, contrary to the express prohibition of the 23d section of the judiciary act ; but no writ of error was taken out. The court declared, that if the executions were irregular, "the court from which they issued ought to have been moved to set them aside. They were not void, because the marshal could have justified under them ; and if voidable, the proper means of destroying their efficacy had not been pursued." The decree of the circuit court was affirmed, and the money ordered to be paid over to the execution-creditor. 4 Cranch 328, 333.

In *Wheaton v. Sexton*, the case turned on the validity of the sale of real estate by the marshal of this district, by virtue of an execution, in which the language of this court is : "The purchaser depends on the judgment, the levy and the deed. All other questions are between the parties to the judgment and the marshal. Whether the marshal sells before or after the

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return ; whether he makes a correct return, or any return at all to the writ; is immaterial to the purchaser, provided the writ was duly issued, and the levy made before the return." 4 Wheat. 506.

In *Thompson v. Tolmie*, there had been a sale under an order of the orphans' court of this district, which had been confirmed by them, and a deed made to the purchaser, the validity of which was questioned, on objections similar to those now under consideration. The court say : " Those proceedings were brought before the court collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings ; they were commenced in a court of justice ; carried on under the supervising power of the court, and to receive its final ratification. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears on the face of them, that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court, to set them aside, or in an appellate court. If there is a total want of jurisdiction, the proceedings are void, and a mere nullity, and confer no right, and afford no justification ; and may be rejected, when collaterally drawn in question."

The purchaser is not bound to look beyond the decree, when *executed by a conveyance, if the facts necessary to give jurisdiction appear on the face of the proceedings ; nor to look further back than the order of the court. " If the jurisdiction was improvidently exercised, or in a manner not warranted by the evidence before it, it is not to be corrected at the expense of the purchaser ; who had a right to rely upon the order of the court, as an authority emanating from a competent jurisdiction." 2 Pet. 163, 168, " When a court has jurisdiction, it has a right to decide every question that arises in the cause ; and whether the decision be correct or not, its judgment, until reversed, is regarded as binding in every other court." *Elliott v. Piersol*, 1 Pet. 340 ; 2 Ibid. 169.

In *Tayloe v. Thomson*, this court affirmed a principle of the common law ; that the sale of a term of years under a *fieri facias*, issued after and while the defendant was in execution under a *ca. sa.* on the same judgment, was good, when made to a stranger to the execution. 5 Pet. 370. In the *United States v. Arredondo*, it was laid down as a universal principle, that when power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion ; the acts so done are valid and binding as to the subject-matter ; and individual rights will not be disturbed collaterally, for anything done in the exercise of that discretion, within the authority and power conferred. The only questions which can arise, between an individual claiming a right under the acts done, and the public, or any person denying their validity, are power in the officer, and fraud in the party. All other questions are settled by the decision made, or the act done by the tribunal or officer, unless an appeal or other revision of their proceeding is prescribed by law. 6 Pet. 729-30.

These are rules of property which have been established, so far as the authority of this court can do it ; they apply to and must govern this case, on the broad principles laid down ; and none of them come into collision with any construction given to the laws of Ohio, prescribing the mode of

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transferring real estate by judicial process. On the broadest ground, therefore, which has been taken in any of the specified objections to the proceedings of the court of common pleas in the attachment-suit, we are most clearly of opinion, that none of them can be sustained, without the violation of principles which ought to remain inviolable.

The remaining objection is, that the auditors did not make their *deed to the person who purchased at the sale under the order of the [*479 court. This is a matter entirely between such person and those to whom the deed was made ; to Cutter, it is immaterial, to whom the conveyance was made ; his right was extinguished by the sale and confirmation. It is equally immaterial to those who claim under Cutter, who received the deed ; Stanley, the purchaser, or Foster, the plaintiff ; it was a matter between themselves, which can have no effect on the validity of the sale, were it unexplained. But connecting the record with the deeds, their inspection removes the objection, for the reasons stated in the argument of counsel. Samuel Foster was the principal creditor, and plaintiff in the suit ; Stanley purchased, but took his deed from Foster and Woodward, with their covenants of seisin, warranty and title ; had he taken a deed directly from the auditors, it must have been without any covenants. The object was evidently to have an assurance of the title ; for both deeds were executed and acknowledged on the same day, and the consideration of both was the same. The judgment of the circuit court is affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Ohio, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*THOMAS JACKSON *et al.*, Appellants, v. WILLIAM E. ASHTON. [*480]

Amendment in error.

After a case has been dismissed for want of jurisdiction, the pleadings having been technically defective, the court will not, at a subsequent term, allow them to be amended, and the case to be reinstated on the docket ; it would be, in effect, a reversal of the former decree, after the case had been finally disposed of in this court.¹

There will be no difficulty in making the amendment in the circuit court, in such a case, if that court shall see fit, in its discretion, to allow it to be done, and the cause may then be reheard there ; and on a decree, newly rendered, may be brought up on appeal to this court ; or a decree may be there rendered, by consent of parties, in order to bring up the case without delay.

THIS case was before the court at January term 1834, on an appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was dismissed for want of jurisdiction ; the complainants, Thomas Jackson and others, in the circuit court, having omitted to state in the body of the bill, filed on the equity side of the court, that the defendant was a citizen of the state of Pennsylvania. (8 Pet. 148.)

¹ Schell v. Dodge, 107 U. S. 620.

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Key and *Peters* now applied to the court for liberty to amend the record, by stating the citizenship of the defendant, and to reinstate the cause on the docket.

STORY, Justice, delivered the opinion of the court.—A motion has been made to allow an amendment of the record of this case, by inserting an allegation of the citizenship of the parties, and to reinstate this cause on the docket, under the following circumstances: The cause came before this court at the January term 1834, and, as will be found in 8 Pet. 148-9, was then reversed for want of jurisdiction of the circuit court, by reason of the omission to allege, that the parties were citizens of different states, the appeal to this court was dismissed; and the decree of this court was ordered to be certified to the circuit court.

We are of opinion, that under these circumstances, the record cannot be amended, or the cause reinstated in this court. It would, in effect, be a reversal of the former decree of this court. We have no power over the decrees ^{*481]} rendered by this court, after the term has ^{*}passed, and the cause has been dismissed, or otherwise finally disposed of here.

But in our opinion, there is no difficulty in making the proposed amendment in the circuit court, if that court shall see fit, in its discretion, to allow it to be done. The cause may then be reheard there; and upon the decree newly rendered, an appeal can then be taken to this court; or a decree may be there rendered, by consent of the parties, in order to bring the cause, without any delay, to this court.

This court, in rendering its former decree, had no authority (not having any jurisdiction, but to reverse for the want of jurisdiction of the circuit court) to send the cause back for further proceedings, with liberty to amend the bill. But the mandate was not understood by us to apply, except to the record in its then state; and we entertain no doubt, that notwithstanding any thing in the former decree of reversal, it is entirely competent for the circuit court, in their discretion, to allow the amendment now proposed to be made, and to reinstate the cause in that court. But we have no authority in the matter. The motion is, therefore, overruled.

Motion overruled.

^{*482]} *SAMUEL B. LEE, Plaintiff in error, v. NATHANIEL DICK and others.

Commercial guarantee.

L., at Memphis, Tennessee, addressed a letter to D. & Co., at New Orleans, stating that N. & D. wished to draw on them for \$2000, saying, "Please accept their draft, and I hereby guaranty the punctual payment of it." In a letter of the same date, to one of the firm of N. & D., he said, "I send a guarantee for \$2000; the balance, I have no doubt, your friend W. will do for you. N. & D. drew a bill on D. & Co. for \$4250, which they accepted; and after having paid the draft, they gave notice to L. that they looked to him for the money; no notice was given by D. & Co. to L., that they intended to accept, or had accepted, and acted upon the guarantee, before they paid the draft; the drawers of the bill did not reimburse D. & Co. for any part of it. Action was instituted to recover \$2000 from L., being part of the bill for \$4250: Held, that although the bill was drawn for \$4250, the guarantee would have operated to bind L. for the sum of \$2000 included in it, if notice of the acceptance of it had been given

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by D. & Co. to L.; but having omitted to give such notice, or that they intended to accept, or had accepted and acted on the guarantee, L. was not liable to D. & Co. for any part of the bill for \$4250.

A guarantee is a mercantile instrument, and to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety.

If the guarantee stood alone, unexplained by the letter which accompanied it, it would undoubtedly be limited to a specific draft for \$2000, and would not cover that amount in a bill for a larger sum; but the letter which accompanied it fully justified the conclusion, that the defendant undertook to guaranty \$2000, in a draft for a larger amount. The letter and guarantee were both written by the defendant, on the same sheet of paper, bear the same date, and may be construed together, as constituting the guarantee.

The decision of the court in the case of Douglass v. Reynolds, 7 Pet. 125, affirmed. In that case, the court held, that a party giving a letter of guaranty has a right to know whether it is accepted; and whether the person to whom it is addressed means to give credit on the footing of it, or not; it may be most material, not only as to his responsibility, but as to future rights and proceedings; it may regulate, in a great measure, his course of conduct, and his exercise of vigilance in regard to the party in whose favor it is given; especially is it important, in case of a continuing guarantee, since it may guide his judgment in recalling or suspending it. This last remark by no means warrants the conclusion, that notice is not necessary in a guarantee of single transaction; but only, that the reason of the rule applies more forcibly to a continuing guarantee.

The same strictness of proof of notice, is not necessary, to charge a party upon his guarantee, as would be to support an action upon the bill itself, when, by the law-merchant, a demand upon, and refusal by, the acceptors, must be proved, in order to charge any other party upon the bill. There are many cases where the guarantee ^{is} of a specific existing demand, by a ^{1*483} promissory note or other evidence of a debt, and such guarantee is given upon the note itself, or with reference to it, and recognition of it, when no notice would be necessary; the guarantor, in such cases, knows precisely what he guarantees, and the extent of his responsibility; and any further notice to him would be useless. But when the guarantee is prospective, and to attach upon future transactions, and the guarantor uninformed whether his guarantee has been accepted and acted upon, or not; the fitness and justice of the rule requiring notice, is supported by considerations that are unanswerable.¹

ERROR to the Circuit Court for the district of West Tennessee. On the 24th of September 1832, Samuel B. Lee, the plaintiff in error, of Memphis, Tennessee, addressed to N. & J. Dick & Company, at the New Orleans, a letter in the following terms:

"Gentlemen:—Nightingale & Dexter, of Maury county, Tennessee, wish to draw on you at six and eight months; you will please accept their draft for \$2000, and I do hereby guaranty the punctual payment of it.

SAMUEL B. LEE."

On the same paper containing this guarantee, and on the same day, Mr. Lee wrote a letter to P. B. Dexter, one of the firm of Nightingale & Dexter, in which he said, "I have no objections to guaranty your bill, except it might affect my own operations. I, however, send guarantee for \$2000, which you can use, if you choose. The balance, I have no doubt, your friend, Mr. Watson, will do for you. I would cheerfully do the whole amount; but expect to do business with that house, and do not wish to be cramped in my own operations."

On the 5th of October 1832, Nightingale & Dexter, at Nashville, having forwarded the letter of guaranty given by the plaintiff in error, drew a bill of exchange for \$4250, on N. & J. Dick, at New Orleans, payable six

¹ See note to Russell v. Clarke's Executors, 7 Cranch 69.

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months after date ; which bill was accepted on the faith of the guarantee, and they paid the same, and gave notice to Mr. Lee that they looked to him for the money. The defendants in error not having been repaid the amount of the bill by the drawers, instituted an action against Samuel B. Lee, on his guarantee ; and in September 1835, the cause was tried, and a verdict and judgment were rendered in favor of the plaintiffs.

During the progress of the trial of the cause, the following bill of exceptions was tendered, and was sealed by the court. *The court charged [484] the jury, that if the defendant intended to guaranty a bill of exchange, to be drawn for \$2000, he would not be liable upon a bill drawn for upwards of \$4000 ; but if he intended to guaranty \$2000 of a bill to be drawn for a larger amount, that then he would be liable for the \$2000. That the court was of opinion, the letter accompanying the guarantee was admissible in evidence, to explain whether the guarantor meant to guaranty a bill for \$2000, or only \$2000 in a bill for a larger amount ; and it was the opinion of the court, that the true construction of the guarantee was, that he intended to guaranty the payment of \$2000 in a bill to be drawn for a larger amount. The court also charged the jury, that no notice by N. & J. Dick & Co., to the defendant, that they intended to accept or had accepted and acted upon this guarantee, was necessary. The defendant prosecuted this writ of error.

The case was submitted to the court, on printed arguments, by *Peyton*, for the plaintiff ; and by *Bell*, for the defendants.

Peyton stated, that in this case, it appears, that the plaintiff, as matter of accommodation, did, on the 24th day of September 1832, at Memphis, in the state of Tennessee, at the request of the house of Nightingale & Dexter, of Maury county, Tennessee (a distance of more than 200 miles from Memphis), agree to guaranty the payment of a draft of \$2000, to be drawn thereafter by the house of Nightingale & Dexter on the firm of N. & J. Dick & Co., of New Orleans ; that Nightingale & Dexter, on the 5th of October 1832, drew a draft in favor of H. R. W. Hill, on N. & J. Dick & Co., of New Orleans, for the sum of \$4250 ; which draft having been paid by N. & J. Dick, they instituted suit in March, 1835, against S. B. Lee, upon his guarantee.

Upon the trial of the cause below, the court permitted a letter to be read, which was written by the plaintiff to Mr. P. B. Dexter ; to the reception of which the plaintiff in error objected. It was shown that N. & J. Dick & Co. accepted the bill of \$4250, upon the faith of the said guarantee, and proved also, that they paid it, and gave notice to the defendant that they looked to him for the money. But there is no proof of notice that the [485] guarantee of the plaintiff was *accepted ; nor was there any proof of a demand of the money from the house of Nightingale & Dexter, and notice of their failure to pay given to the plaintiff. The plaintiff in error relies upon the following points and authorities :

1. The guarantee was for a draft of \$2000 ; the draft in this case was for \$4250. If A. guaranty a specific amount, to be secured by a draft to that identical amount, he is not liable for any part of a draft for a greater amount. He might have been aware, that the means and ability to pay, in case of loss, by misfortune or otherwise, of his friend, would not reach

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beyond that point : and if he had known, that he intended to contract a debt beyond his means, it might have been a sufficient cause for declining to become bound for any part of that amount. As for the letter written by the plaintiff to Dexter, it was inadmissible in evidence, because it cannot change the guarantee in any essential manner whatever. The guarantee is the written contract ; this letter is not between the same parties ; it was not necessarily exhibited by Dexter to the defendants. But, if it is to be received in evidence, is it at all inconsistent with the guarantee ? He does not state in his letter, how, or in what manner, he is willing to guaranty his part of the amount desired to be raised ; whether he will secure that sum by guarantying part of a large draft, or the whole of a small draft ; whether he was willing to involve his name and credit with that of any other man on a large draft or not. To determine this question, we must refer to the guarantee itself ; that clearly shows the manner, as well as the amount which he was willing to guaranty. The terms of this written contract, between the plaintiff and the defendants, are clear and unambiguous ; ought their force and effect to be extended, by a reference to the letter of plaintiff to Dexter, not a part of that contract, a private letter, couched in friendly terms, making an apology for not agreeing to go further, and do more than he had done in the written agreement ? Did he write this letter for the eyes of the defendants ? Might it not have been withheld for them, with propriety, by Dexter ?

Nightingale & Dexter wish to draw for a large amount of money on N. & J. Dick & Co. It could not be effected, without security. The defendant is unwilling to go further than a specific amount, secured in a draft to be drawn for that amount. In this letter to Dexter, he says : "I send a guarantee for \$2000, which you can use, if you choose ; the balance, I have no doubt, your friend, *Mr. Watson, will do for you," &c. But suppose, Mr. Watson does not do so ; is the bill or draft to be for [486 double the amount, and the balance unsecured ? This is made certain by a reference to the guarantee. How could it be supposed, that the plaintiff would have guarantied one dollar alone, and without Mr. Watson, or some other responsible guarantor for the balance, of a larger amount than \$2000 ? He had no right to suppose any further credit than the draft of \$2000 would be extended, unless some one would guaranty the payment of the amount over and above that sum. He had an important interest, that the credit should not be so extended, without security. But at all events, his name and his credit were not to be involved with any other or greater amount than that specified in the guarantee. In support of this point, the plaintiff refers to the following authorities : *Phillips v. Astling*, 2 Taunt. 206, 212 ; 3 Wheat. 151-2.

2. The plaintiff relies, mainly, on the want of notice ; and contends, that the defendants were bound to give him notice—first, of the acceptance of the guarantee by the defendants, and that they had or would extend the accommodation on the footing of it, and to what amount he was liable ; second, that the defendants were bound, after the payment of the money for Nightingale & Dexter, to make a demand of them for payment, and give notice of such demand and refusal to the plaintiff.

What is the meaning of this guarantee ? If you, Mr. Dick, will accept the draft of the house of Nightingale & Dexter, at six or eight months,

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I will guaranty that you shall be punctually paid the money. Is the plaintiff to remain in ignorance of his liability, until the draft falls due? Is this responsibility to be sprung upon him by a protest? by the loss of his credit? and without one hour's time to prepare for the shock? It is part of the contract itself; it is a well-settled principle in "the law and usages of merchants," that a party giving such a guarantee has a right to be informed, within a reasonable time, whether it is accepted, and to what extent he is liable. This knowledge is not a formal matter, but may be, and generally is, most material, not only as to his responsibility, and the necessity of providing the means to meet that responsibility, and save his credit, which is so vitally important to a merchant; but it may be equally important in future proceedings, dealings, &c., between the parties. It may excite him to vigilance in looking to his own final security,

These undertakings for the debt of another have always *been strictly construed by the courts. The case of *Douglass v. Reynolds*, 7 Pet. 113, is directly in point. In p. 125, the court says, "the party giving a letter of guaranty has a right to know whether it is accepted," &c., and assigns the most conclusive and satisfactory reasons for that "right." In the case of *Edmondston v. Drake*, 5 Pet. 624, 637, the court says, "it would, indeed, be an extraordinary departure from that exactness and precision which peculiarly distinguish commercial transactions, which is an important principle in the law and usage of merchants, if a merchant should act on a letter of this character, and hold the writer responsible, without giving notice to him that he had acted on it. The authorities quoted at the bar on this point, unquestionably establish this principle." In *Russell v. Clarke's Executors*, 7 Cranch 92, Chief Justice MARSHALL says, "plaintiff must give immediate notice to the defendant of the extent of his engagements," in such a case as the present. This principle is so clearly and so recently established by the decisions of this court, in the cases above cited, that it is not deemed to be important by the plaintiff to accumulate authorities upon this point. He referred to a few others, viz., 7 Pet. 113, 125; 5 Ibid. 624, 647; 1 Mason 340; 7 Cranch 91-2.

8. The plaintiff contends, that a demand of payment should have been made of Nightingale & Dexter; and in case of non-payment by them, that notice of such demand and non-payment should have been given in a reasonable time to the plaintiff; and, for want of this, he is discharged from his guarantee. In the case of *Douglass v. Reynolds*, before referred to, 7 Pet. 127, there will be found an authority directly in point. The court says: "by the very terms of the guarantee, as well as by the general principles of law, the guarantors are only collaterally liable, upon the failure of the principal debtor to pay the debt. A demand upon him, and a failure on his part to perform his engagements, are indispensable to constitute a *causus foederis*," &c. "The guarantors are not to be held to any length of indulgence of credit which the creditors may choose," &c. This position is sustained by the other authorities referred to on the preceding points. The only notice given by N. & J. Dick & *Co., as appears from the record, was, that they looked to the plaintiff for the money.

The court below charged the jury, "that no notice by N. & J. Dick & Co. to the defendant, that they intended to accept, or had accepted and acted upon this guarantee, was necessary." Thus, the plaintiff was kept in

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ignorance of his liability for a firm, at a great distance from his residence, the condition of which was unknown to him; having no motive, no interest, to inquire into its condition, although it was in failing circumstances; and all others whose fate depended upon its success, had an opportunity of knowing the facts, and the privilege of endeavoring to provide a remedy. This cannot be the fair interpretation of the rule of law applicable to such cases. In permitting the letter of the plaintiff to Dexter to be read, it was agreed, "that it should go to the jury, together with the bill of exchange, and their effect be charged upon by the court. The court was of opinion, that the letter of the plaintiff to Dexter was admissible in evidence, to explain whether the guarantor meant to guaranty a bill for \$2000 only, or \$2000 in a bill for a larger amount; and it was the opinion of the court, that the true construction of the guarantor was, that he intended to guaranty the payment of \$2000 in a bill to be drawn for a larger amount." Now, it is evident, that the opinion of the court, as to the intention of the guarantor, was derived, not from the guarantee itself, but from a piece of evidence—the letter. If that letter was admissible at all, it was as matter of evidence, to go to the jury; and they were the proper triers of its force, weight and meaning. The court decided the fact of intention, from evidence adduced; which evidence and conclusion it was the province of the jury to weigh and decide upon for themselves. The court, in the very same paragraph, says, "that, if the defendant intended to guaranty a bill to be drawn for \$2000, he would not be liable upon a bill drawn for upwards of \$4000." And then instructs the jury, that such was not his intention, but that he intended to guaranty a part of a large draft, &c. This was deciding the whole question. The jury had nothing to do but to tender a verdict against the defendant below.

Bell, for the defendants.—It was objected, upon the trial, that the guarantee was for \$2000, and the bill drawn by Nightingale & Dexter was for \$4250. The letter accompanying the guarantee, together with the bill for \$4250, were offered in evidence, to prove that Lee had engaged [^{*489} to guaranty \$2000, part of a bill for a larger amount; and it was "agreed" by counsel, that the effect of this evidence should be charged upon by the court. It was the opinion of the court, that the true construction of the guarantee was, that the guarantor intended to guaranty the payment of \$2000, in a bill for a larger amount. It is difficult to see how there could be any doubt upon this point. The letter to P. B. Dexter ought to be regarded as full and satisfactory. In one part of the letter, he says, "I have no objections to guaranty your bill, except it might affect my own operations; I, however, send you a guarantee for \$2000, which you can use, if you choose; the balance, I have no doubt, your friend Watson will do for you."

But it was objected, that no notice had been given by N. & J. Dick & Co. to Lee, the guarantor, that they accepted the guarantee, or that they had accepted a bill upon the faith of it; and the court charged, that no such notice was necessary. There is no general rule of law applicable to the question presented in the record. Every case of guaranty must be decided upon its own particular circumstances. The case of *Douglass v. Reynolds*, 7 Pet. 118, is the only one in which the doctrine is assumed, that such

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notice, in all cases, is necessary, and the right of the guarantor ; and in that case, the question did not arise, and could not call for the serious attention of the court. That was clearly a case of a continuing guarantee ; in regard to which, so many considerations of convenience and fairness urge the reasonableness of the doctrine, that the courts have gone very far in adding to and perfecting such contracts between parties, by assimilating them to the conditional undertakings of indorsers and drawers of bills and notes. But in the case of a limited and specific guarantee, like the present, it is submitted, with deference, that there is no settled rule of law, requiring notice to be given, either of the acceptance of the guarantee, or that any liability has been assumed upon the faith of it. There are cases, unlike the present, however, in which it was proved, that injury had been sustained by the want of such notice ; and where it was ruled, that no notice having been given, was a fatal omission.

The transaction in the case before the court is peculiar. The precise nature of it appears from the facts set forth in the bill of exceptions.

*The bill, part of which was guaranteed by Lee, was made to enable [490] the drawers, Nightingale & Dexter, to raise funds in Tennessee ; and it was accepted by N. & J. Dick & Co. for their accommodation, upon the faith of the guarantee. Lee does not give a guarantee to the holder of the bill, that the drawers shall accept, or when accepted, that they shall pay it, or that the drawers shall pay the bill to the holders, upon failure of the acceptor to pay—the usual case of guarantee : it is a contract of guarantee, collateral to, and separate from, the bill, entered into by Lee, who had no dealings with the drawers, that Nightingale & Dexter, the drawers of the bill, and who, he knows, from the nature of the transaction, had no funds in the hands of the acceptors, shall be punctual in providing funds to meet their own bill, at maturity. He agrees, that if N. & J. Dick will draw a bill for the accommodation of Nightingale & Dexter, and they should fail to make punctual provision for its payment, he would pay it, upon demand, himself. All the circumstances of the case showed, that when the guarantee was given, he could not doubt, that it would be accepted and acted upon. It was a presumption he was bound to act upon. If he had had notice that the bill was accepted upon the faith of his guarantee, all he could have done would have been to urge Nightingale & Dexter to make the necessary provision to meet the bill when due. N. & J. Dick & Co., upon the request, and the guarantee of Lee, accepted a bill at six months, for the accommodation of Nightingale & Dexter ; it becomes due, and they have to pay it out of their own funds.

The question is, shall they lose the benefit of his guarantee, or shall Lee escape responsibility, upon the ground that no notice was given to him that his guarantee was accepted, or that a bill had been accepted upon the faith of it, until the maturity of the bill, and after payment of it out of their own funds, by the acceptors, upon the default of the drawers to make the necessary provision. What law, or rule of law, created by judicial construction, compels such a result, in the case of a guarantee, which does not appear upon the bill ; and when the transaction is specific and single ? It is respectfully submitted, that no case of this nature, has ever gone off upon such a principle. The general rule, in relation to notices, in the case of a guarantee not appearing upon a bill or note, is, that the guarantor cannot object

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to the want of it. That this is the doctrine recognised *by the writers upon this subject, may be seen in Chitty on Bills, 204, 229, 230, 259, and the cases there referred to. There is a distinction between the rights of guarantors who are parties to bills and notes, and those whose names do not appear among them. Notice of a failure to accept or pay a bill or note guaranteed by a separate contract, does not appear to be required in any case. When the guarantor is party to the bill or note, the rule is not so strict as in an ordinary case of indorsement. It is going beyond all former rules and decisions, in analogous cases, to require notice to be given to a guarantor, by an indorser or acceptor of a bill, that he took the bill, or became a party to it, upon the faith of the guarantor, before there was any default of payment.

It is also objected, that demand of payment should have been made by N. & J. Dick & Co. of Nightingale & Dexter, and notice of failure to pay upon such demand given to Lee, before he could be charged. The undertaking of Lee was absolute, that Nightingale & Dexter should make punctual provision for the payment of the bill. In some cases, where the guarantor is a party to the bill, if the guarantee is absolute, no notice is necessary. 20 Johns. 365. In all cases of guaranty, it may be laid down as a general rule, that if the guarantor is not prejudiced by the want of notice, he cannot object. 8 East 242; Chitty on Bills 259.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up on a writ of error from the circuit court of the United States for West Tennessee. It was a special action on the case, on a guarantee given by the plaintiff in error in favor of Nightingale & Dexter. The declaration is special, stating that the defendant in the court below, by his guarantee, bearing date the 24th of September, in the year 1832, directed and addressed to the plaintiffs below, requested them to accept the draft of Nightingale & Dexter for the amount of \$2000, and thereby promised to guaranty the punctual payment of the same to that amount; and avers, that Nightingale & Dexter afterwards, on the 5th of October 1832, drew a bill on the plaintiffs below for \$4250; and that, confiding in the promise of the defendant, they accepted the same, &c. The declaration contains a count alleging an agreement by the defendant to guaranty the payment of \$2000 part of the \$4250; with the necessary averments to charge the defendant with the payment of the \$2000. *The defendant pleaded the general issue; and upon the trial of the cause, the plaintiff produced the following evidence: [492]

"Messrs. N. & J. Dick & Co. Memphis, September 24th, 1832.

"Gentlemen:—Nightingale & Dexter, of Maury county, Tennessee, wish to draw on you at six or eight months date. You will please accept their draft for \$2000, and I do hereby guaranty the punctual payment of it. Very respectfully, your obedient servant,
SAMUEL B. LEE.

"Exchange for \$4250.

Nashville, October 5th, 1832.

"Six months after date of this first of exchange (second unpaid), pay to H. R. W. Hill, or order, 4250 dollars—cents, value received, and charge the same to account of yours, &c.. NIGHINGALE & DEXTER.

"To N. & J. Dick & Co., New Orleans."

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The plaintiff also offered in evidence the following letter of the defendant, Samuel B. Lee; which letter was written upon the same sheet of paper with the guarantee, but on different parts of it.

"Mr. P. B. Dexter:

Memphis, September 24th, 1832.

"Dear Sir:—Yours of the 15th inst. came to hand in due time. I was absent, or should have answered it sooner. I left Mount Pleasant sooner than I expected when I saw you last. I learned that my presence was wanted at Savannah, and put off. It had calculated to get along with business, without having anything to do with drawing bills or with the bank; but there is no cash in this quarter, and our bills at the east are falling due, and I have no other alternative but to draw for what funds I am compelled to have, and may, during the winter (should I go largely into the cotton market), wish to draw for a considerable amount. I have no objections to guaranty your bill, except it might affect my own operations. I, however, send you a guarantee for \$2000, which you can use if you choose. The balance I have no doubt your friend, Mr. Watson, will do for you. I would cheerfully do the whole amount, but expect to do business with that house, *493] and do not wish to be cramped *in my own operations. Spun thread, also coarse homespun, are in good demand. My compliments to Mrs. and Miss Nightingale. Your friend,

It was agreed by the counsel, that the bill of exchange and letter should go to the jury, and their effect, &c., be charged upon by the court. The plaintiff proved that N. & J. Dick & Co. accepted the above bill, upon the faith of the said guaranteee, and that they had paid it, and gave notice to the defendant, that they looked to him for the money. The court charged the jury, that if the defendant intended to guaranty a bill of exchange to be drawn for \$2000, he would not be liable for a bill drawn for upwards of \$4000 ; but if he intended to guaranty \$2000 of a bill to be drawn for a larger amount, then he would be liable for the \$2000. That the court was of opinion, that the letter accompanying the guaranteee was admissible in evidence, to explain whether the guarantor meant to guaranty a bill for \$2000, or only \$2000 in a bill for a larger amount. The court also charged the jury, that no notice, by N. & J. Dick & Co. to the defendant, that they intended to accept, or had accepted and acted upon this guaranteee, was necessary. To which opinion of the court, the defendant excepted.

The questions arising upon this case are: 1st. Whether this evidence will warrant the conclusion, that the defendant intended to guaranty \$2000 in a bill to be drawn for a larger sum. 2d. Whether N. & J. Dick & Co. were bound to give notice to the defendant, that they intended to accept, or had accepted and acted upon, the guarantee.

A guarantee is a mercantile instrument, and to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety. If the guarantee stood alone, unexplained by the letter which accompanied it, it would undoubtedly be limited to a specific draft for \$2000, and would not cover that amount in a bill for a larger sum; but the letter which accompanied it fully justifies the conclusion, that the defendant undertook to guaranty \$2000 in a draft for a larger amount. The letter and guarantee were both written by the defendant, on the same sheet of paper, bear the same date, and may be

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*construed together, as constituting the guarantee. 7 Cranch 89. This letter is obviously in answer to one received from Dexter, one of the firm of Nightingale & Dexter; for he says, "Your letter of the 15th instant came to hand in due time, &c. I have no objection to guaranty your bill, except it might affect my own operations. I, however, send a guarantee for \$2000, which you can use, if you choose." This was clearly in answer to an application to guaranty a larger sum; and admits of no other construction than that he should have no objection to guaranty the whole sum he requested, if he was not under apprehensions that it would affect his own operations. The bill not having been drawn until the 5th of October, eleven days thereafter, the letter must have referred to a bill he wished to draw. But this is not all, he adds, "the balance I have no doubt your friend, Mr. Watson, will do for you." The balance! What balance could this mean? Clearly, the balance between the \$2000 for which he sent the guarantee, and the amount of the sum mentioned in the letter for which he wanted a guarantee. And again, he says, "I would cheerfully do the whole amount, but expect to do business with that house, and do not wish to be cramped in my own operations." The whole amount! What amount is here referred to? This admits of no other answer, than that it was the amount of the sum mentioned in the letter he had written to Dexter, in which he requested a guarantee. The opinion of the circuit court, therefore, upon the construction of the guarantee, was correct.

The next question is, whether the plaintiffs were bound to give notice to the defendant, that they intended to accept, or had excepted and acted upon, this guarantee. It is to be observed, that this guarantee was prospective; it looked to a draft thereafter to be drawn; and this question is put at rest by the decisions of this court.

The case of *Russell v. Clarke's Executore*, 7 Cranch 91, was a bill in chancery to recover a sum of money upon a guarantee alleged to grow out of several letters, written by Clarke & Nightingale to Russell. The court say, "we cannot consider these letters as constituting a contract by which Clarke & Nightingale undertook to render themselves liable for the engagement of Robert Murray & Co. to Nathaniel Russell; had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendant, of the extent of his engagements." Although the point now in question was not precisely the one before the court in that case, as there was *no contract of guaranty [495 made out, yet it is laid down as a settled and undisputed rule.

The case of *Edmondston v. Drake*, 5 Pet. 624, was an action founded on a letter of credit, given by Edmondston to Castillo & Black, as follows:-- "Gentlemen: The present is intended as a letter of credit in favor of my regarded friends, Messrs. J. & T. Robinson, to the amount of 40 or 50,000 dollars; which sum they may wish to invest, through you, in the purchase of your produce. Whatever engagements these gentlemen may enter into, will be punctually attended to." On the trial, the court was requested to instruct the jury, that in order to make the defendant liable to the plaintiff, under the contract, they were bound by the law-merchant to give him due notice. Upon this prayer, the court was divided, and the instruction was not given; and this court decided, that the instruction ought to have been given. The court said, it would indeed be an extraordinary

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departure from that exactness and precision which peculiarly distinguish commercial transactions (which is an important principle in the law and usages of merchants), if a merchant should act on a letter of this character, and hold the writer responsible, without giving notice to him that he had acted on it. The authorities on this point, say the court, unquestionably establish this principle.

And again, the case of *Douglass v. Reynolds*, 7 Pet. 125, was an action upon a guarantee; and the court was requested to instruct the jury, that to enable the plaintiff to recover on the letter of guaranty, they must prove that notice had been given, in a seasonable time after said letter of guaranty had been accepted by them, to the defendant, that the same had been accepted. This instruction the court below refused to give; and this court say the instruction asked was correct, and ought to have been given. That a party giving a letter of guaranty has a right to know whether it is accepted; and whether the person to whom it is addressed means to give credit on the footing of it, or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate in a great measure his course of conduct, and his exercise of vigilance in regard to the party in whose favor it is given. Especially is it important, in case of a continuing guarantee, since it may guide his judgment in recalling or suspending it. This last remark by no means warrants the conclusion that notice is not necessary in a guarantee of a single transaction; but only that the reason of the rule applies more forcibly to a continuing *guarantee. It is unnecessary, after such clear and decided authority in this court on this point, to fortify it by additional adjudications. We are not aware of any conflict of decisions on this point; and if there are, we see no reason for departing from a doctrine so long and so fully settled in this court.

*496] We do not mean to lay down any rule with respect to the time within which such notice must be given. The same strictness of proof is not necessary, to charge a party upon his guarantee, as would be necessary to support an action upon the bill itself; when by the law-merchant a demand upon, and refusal by the acceptors must be proved, in order to charge any other party upon the bill. 8 East 245. There are many cases where the guarantee is of a specific existing demand by a promissory note or other evidence of a debt; and such guarantee is given upon the note itself, or with reference to it and recognition of it; when no notice would be necessary. The guarantor, in such cases, knows precisely what he guarantees, and the extent of his responsibility; and any further notice to him would be useless. 14 Johns. 349; 20 Ibid. 365. But when the guarantee is prospective, and to attach upon future transaction; and the guarantor uninformed whether his guarantee has been accepted and acted upon or not, the fitness and justice of the rule requiring notice is supported by considerations that are unanswerable. We are accordingly of opinion, that the circuit court erred in deciding that notice was not necessary; and that the judgment must be reversed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of West Tennessee, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this

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cause be and the same is hereby reversed ; and that this cause be and the same is hereby remanded to the said circuit court for further proceedings.

ELIZA BROWN, Appellant, v. FRANCIS SWANN, Administratrix of [497
WILLIAM T. SWANN, and RICHARD B. ALEXANDER.

Discovery.

The statute of Virginia against usury, provides, that "any borrower of money or goods, may exhibit a bill in chancery against the lenders, and compel them to discover, on oath, the money they really lent ; and all bargains, contracts or shifts which shall have passed between them, relative to such loan, or the repayment thereof, and the interest and consideration of the same ; and if, thereupon, it shall appear, that more than lawful interest was reserved, the lender shall be obliged to accept his principal money, without interest or consideration, and pay costs ; but shall be discharged of all the other penalties of this act." The complainants in the circuit court of the county of Alexandria, in the district of Columbia, filed a bill to obtain relief under the statute, against an alleged usurious loan ; and made a contingent and prospective offer to pay the principal, when the affairs of the intestate (the borrower) "would admit it ;" and there was no averment that the complainants were unable to prove the facts sought from the conscience of the defendants by other testimony: *Held*, that the bill was deficient in material averments, essential to all such bills of discovery.

When the legislature of Virginia passed the statute, it fixed the nature and extent of the jurisdiction of a court of equity to compel a discovery, upon oath, from an interested party, in a suit either at law or in equity ; and the rules which equity had prescribed to itself to enforce its jurisdiction in this regard ; it knew the distinction between a bill for such discovery, from other bills in chancery ; which are also bills for discovery. One of the former is a bill for the discovery of facts alleged to exist only in the knowledge of a person, a party to a private transaction with the person seeking the disclosure, essential to the establishment of a just right in the latter, and which would be defeated without such disclosure ; in other words, it is a bill to discover facts, which cannot be proved, according to the existing forms of procedure at law. The jurisdiction of a court of equity, in this regard, rests upon the inability of the courts of common law to obtain, or to compel such testimony to be given ; it has no other foundation : and whenever a discovery of this kind is sought in equity, if it appear that the same facts could be obtained by the process of the courts of common law, it is an abuse of the powers of chancery to interfere. The courts of common law having full power to compel the attendance of witnesses, it follows, that the aid of equity can alone be wanted, for a discovery, in those cases where there is no witness to prove what is sought from the conscience of an interested party ; courts of chancery have established rules for the exercise of their jurisdiction, to keep it within its proper limits, and to prevent it from encroaching upon the jurisdiction of the courts of common law.

The rule to be applied to a bill seeking a discovery from an interested party is, that the complainant shall charge in his bill, that the facts are known to the defendant, and ought to be disclosed by him ; and that the complainant is unable to prove them by other testimony ; and when the facts are desired to assist a court of law in the progress of a cause, it should be affirmatively stated in the bill, that they are wanted for such purpose.¹

*The general is, that after a verdict at law, a party comes too late with a bill of discovery ; there must be a clear case of accident, surprise or fraud, before equity will interfere ; such now is the established doctrine in England, and has been for a longer time the doctrine in the United States. And the doctrine, as applied to a case for relief from usury, is, that a defendant sued at law, on a contract alleged to be usurious, will not be entitled to a bill of discovery, if he suffers a verdict and judgment to be taken against him ; and especially, when he does so, without making a defence at law ; the reason of the rule is, that the proof of usury is a good defence at law ; and when it is in the knowledge of the defendant, no satisfactory reason can be given, why the discovery was not sought while the suit was pending.

¹ *Atwill v. Ferritt*, 2 Bl. C. C. 40 ; *Heath v. Erie Railway Co.*, 9 Id. 816.

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Whenever a party seeking a discovery had knowledge of the facts, during the pendency of a suit at law, equity will not permit him to do so afterwards, to enjoin a judgment. *Swann's Administratrix v. Brown*, 4 Cr. C. C. 247, affirmed.

APPEAL from the Circuit Court of the district of Columbia, and county of Washington.

This case was argued by *Key* and *Jones*, for the appellants; and by *E. J. Lee* and *Swann*, for the appellees.

WAYNE, Justice, delivered the opinion of the court.—This is an appeal from the circuit court of the United States for the district of Columbia and county of Alexandria. The bill of the appellees, who were the complainants in the circuit court is for an injunction to stay further proceedings on a judgment at law, confessed by the appellees to the appellant.

The bill states, that the intestate, William T. Swann, in his lifetime, in October 1819, proposed to borrow from the appellant \$2300, and pay her for the use of the money at the rate of ten per centum per annum. That the appellant agreed to the proposition; \$1000 were secured by a ground-rent of \$152 per annum, on a lot in Alexandria; and the balance of the loan, by a bond, bearing an interest of six per cent. per annum, with William B. Alexander and Richard B. Alexander as sureties. The intestate died in October 1820; and in June 1821, his administratrix paid the appellant \$230; in August following, she paid the further sum of \$1055.30, to which she adds \$115, believed by her to have been paid by the intestate before his death. After these payments, the appellant brought separate suits upon the bond for \$1300, against the administratrix and the sureties to the bond. The bill then states, that the appellees "felt themselves at a loss to know what course to pursue in defence of the said suit. That they had been advised, that the transaction between the defendant and your oratrix's late husband, was usurious; and they understood from their counsel, that if the case was defended at law, upon that ground, and they should succeed, that the debt would be lost to the defendant. That your oratrix and orator were not disposed to push the matter to this extremity; your oratrix knew that her late husband had received the money, and she wished, at all events, that the amount borrowed should be returned to the defendant; and your oratrix's counsel, understanding her wishes, agreed, as he informed her, at the bar, at the time the judgment was rendered upon the bond, with the counsel of the defendant, and in the presence and hearing of the court, that your oratrix's plea of usury should be withdrawn, and a judgment rendered on the bond; with an understanding, that your orator and oratrix should have the privilege of resorting to a court of equity, to have the claim settled, upon the same principles, as if she had instituted against the defendant a bill in chancery for the discovery of the usury. Your oratrix and orator have been advised, that they are bound, in a court of equity, to pay nothing more than the principal debt, and that they are entitled to have credit for the moneys which she has paid, to be deducted out of the sum of \$2300, loaned as aforesaid; and only bound to pay the balance of principal, after such deduction shall have been made."

The bill further states, that if a settlement could be made upon these principles, the oratrix would hold herself bound to pay "the balance which might be due, as soon as the affairs of the estate would admit it."

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That the defendant has issued an execution against your oratrix, and a separate execution against Richard B. Alexander and William B. Alexander, for the whole amount of the bond upon which the judgment at law was rendered ; claiming not only the full amount of the debt, but the interest upon the same ; and is about to enforce the execution against herself and the sureties. The bill concludes with a prayer, "that the defendant may, upon her corporal oath, true and perfect answers make to the several allegations of the bill and the matters therein charged, as if the same were again repeated, and she were interrogated thereto ; that the complainants might have an injunction from the court, restraining the defendant from proceeding further upon the judgment, and from executing the same in any manner ; and that the defendant may render a true and perfect account of all moneys received by her, on account of the aforesaid debt."

Upon filing the bill, the court granted an injunction. At a subsequent *court, the injunction, on motion of the defendant, was in part dissolved ; and the defendant filed a demurrer and answer to the bill. [*500 In the answer, the usury is denied. The complainants filed exceptions to the answer. The injunction was then dissolved, and liberty was given to the defendant to prosecute her judgment at law. At the same time, on complainants' motion, leave was given to amend their bill, and to prosecute the suit thereon ; and the cause was returned to the rules for further proceedings. The defendant's demurrer to the complainants' bill, and the complainants' exceptions to the answer, were then set down for argument. The cause was argued upon the demurrer and exceptions ; and in the June term of the court 1828, the judges were of opinion, that the court had jurisdiction "of the cause in equity, by virtue of the third section of the statute of usury of Virginia ; although the plaintiffs have not stated in the said bill, that they cannot prove the usury, without the aid of the defendant's answer ; and although judgment had been rendered at law ; and the court ordered the demurrs to be overruled, so far as they proceed upon these grounds." The plaintiffs had leave to amend their bill, and the injunction was reinstated as to the whole amount of the judgment in the bill mentioned, except the sum of \$899.70. The supplemental bill was filed, and the defendant put in a demurrer and answer thereto.

We do not think it necessary to refer particularly to the supplemental bill, or to the demurrs and answers of the defendant to either the original or amended bills, or to the intermediate proceedings in the cause. The court made its final decree, in December 1832 ; and in it, and the orders overruling the demands, has put the case upon two points ; which, contrary to the opinion of the court, we think so decidedly in favor of the appellant, that we need not go further. In both, the circuit court was of opinion, that the court had jurisdiction of the cause, by virtue of the third section of the statute of Virginia, against usury ; and in the first order, overruling the demurrs, it added, "although the plaintiffs have not stated in their bill that they cannot prove the usury, without the aid of the defendant's answers, and although judgment has been rendered at law."

The third section of the statute is in these words : "Any borrower of money or goods may exhibit a bill in chancery against the lenders, and compel them to discover, on oath, the money they really lent, and all bargains, contracts or shifts which shall have passed between them, relative

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to such loan or the payment thereof, and *the interest and consideration for the same ; and if, thereupon, it shall appear, that more than lawful interest was reserved, the lender shall be obliged to accept his principal money, without interest or consideration, and pay costs ; but shall be discharged of all the other penalties of this act."

The first question, then, to be considered, is, can the bill of the complainants be brought within the operation of the section ? We think not. Besides only making the contingent and prospective offer to pay the principal, when the affairs of the intestate "would admit of it ;" which is altogether insufficient, as any other indefinite offer or acknowledgment of obligation to pay the principal would be ; the bill is deficient in the material averment, essential to all such bills of discovery as this is, that the complainants are unable to prove the facts sought from the conscience of the defendant, by other testimony ; but on the contrary, facts are stated in it from which a different presumption may be fairly raised.

When the legislature of Virginia passed the statute, it fixed the nature and extent of the jurisdiction of a court of equity to compel a discovery, upon oath, from an interested party, in a suit either at law or in equity, and the rules which equity had prescribed to itself to enforce its jurisdiction in this regard. It knew the distinction between a bill for such discovery, and other bills in chancery ; which are also bills for discovery. One of the former is a bill for the discovery of facts alleged to exist only in the knowledge of a person, a party to a private transaction with the person seeking the disclosure ; essential to the establishment of a just right in the latter, and which would be defeated without such disclosure. In other words, it is a bill to discover facts, which cannot be proved, according to the existing forms of procedure at law. The jurisdiction of a court of equity, in this regard, rests upon the inability of the courts of common law to obtain, or to compel such testimony to be given ; it has no other foundation. And whenever a discovery of this kind is sought in equity, if it shall appear, that the same facts could be obtained by the process of the courts of common law, it is an abuse of the powers of chancery, to interfere. The courts of common law having full power to compel the attendance of witnesses, it follows, that the aid of equity can alone be wanted for a discovery, in those cases where there is no witness to prove what is sought from the conscience of an interested party. Courts of chancery have then established rules for the exercise of this jurisdiction, to keep it within its proper limits, *and [502] to prevent it from encroaching upon the jurisdiction of the courts of common law.

The rule to be applied to a bill seeking a discovery from an interested party, is, that the complainant shall charge in this bill, that the facts are known to the defendant, and ought to be disclosed by him, and that the complainant is unable to prove them by other testimony ; and when the facts are desired to assist a court of law in the progress of a cause, it should be affirmatively stated in the bill, that they are wanted for such purpose. Such is the rule in Virginia, as may be seen in *Duvall v. Ross*, 2 Munf. 290, and in *Bass v. Bass*, 4 Hen. & Munf. 478 ; and it will be applied to the construction of the third section of the statute against usury, upon the authority of her own courts.

Many other authorities to the same purpose might be cited from English

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and American reports. Unless such averments are required, is it not obvious, that the boundaries between the chancery and common-law courts would be broken down ; and that chancellors would find themselves, under bills for a discovery from an interested party, engaged in the settlement of controversies, by evidence *aliunde*, which the common-law courts could have procured, under the process of a *subpoena* ; in delaying proceedings at law, by pretences that a discovery is wanted, for the sake of justice ; and in enjoining judgments, upon indefinite allegations of the plaintiff having a knowledge of facts which give to a defendant an equity to be released ; though the defendant might have availed himself of the evidence of third persons, to establish the same facts, in the progress of the cause, or of the powers of chancery to procure them, by a discovery, to assist the court in deciding it ? which last is the case now under consideration.

The section of the statute, then, under which the circuit court entertained this bill, and enjoined the judgment, should be so construed, as to give the benefit of it to a borrower, only in those cases in which a complainant seeking for a discovery avers that he is unable to prove the facts by other testimony. There is one strong reason, too, for applying this rule to a borrower seeking relief under this law ; and it is, that it permits him to make an appeal to the conscience of the lender, upon terms more favorable than he could have done in equity, to relieve himself from an usurious contract, before this statute was passed. The lender, upon making the discovery, is to receive his principal, without any interest ; and is to *pay costs. This advantage given to the borrower, must be viewed by a court of equity in the nature of a penalty, upon the same principle that other forfeitures, imposed by statutes against usury, are viewed as penalties, which equity will not assist to enforce at all, much less by any evidence *aliunde*. If the lender denies the usury charged, upon his oath, the oath should decide the question before the chancellor. If it be not so, equity will be converted by the section into an assistant for the enforcement of a penalty ; which has never been its province.

By limiting the operation of the section to a denial upon the oath of the defendant, the harmony of chancery jurisdiction to its civil law original is preserved ; and surely, it is not unreasonable, that a complainant's bill, seeking a discovery, for the want of all other testimony, should be not retained, after the answer has denied the matter sought. So it was decided in this court, in the case of *Russell v. Clarke*, 7 Cranch 79 ; and the same position is laid down by other courts. *Ferguson v. Waters*, 3 Bibb 303 ; *Nourse v. Gregory*, 3 Litt. 378 ; and in *Hawkins's Executors v. Sumter*, 4 Desauss. 105.

We think, too, that this construction of the operation of this section is justified by its letter. The words "and if, thereupon, it shall appear, more than lawful interest was reserved ;" have a direct reference to the oath of the lender, denying the usury charged, and are exclusive of evidence *aliunde*, to establish it. Such proof has heretofore been only used to advance the policy of statutes against usury, in courts of common law, as for the greater purposes of strict justice between borrowers and lenders, in courts of equity. Unless a statute, then, in so many words, or by an inference which does not admit of a doubt, commands the courts of equity in Virginia to give relief from usurious contracts, by evidence *aliunde*, without

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requiring the borrower to pay principal and interest, the law should not be so construed. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.

But the section under review should have strict construction as to the relief intended to be given by it to a borrower; because it is not a law in furtherance of strict justice between the borrower and lender. The former has, by it, upon the discovery of the usury by the lender, the use of the money, without paying the interest fixed by the law as a fair compensation for the loan of money. Strict justice requires from the party claiming to *504] be released by equity, *that he should do equity; and in cases of usury, relief has heretofore only been given upon the payment of principal and interest. Shall then a construction be given to this section, by which a borrower may, in all cases, even after judgment has been obtained against him, resort to a court of equity, in Virginia, to establish his statutory right, by evidence *aliunde*, to be relieved from the payment of interest upon money of which he has had the use? If he has such proof, let it be used in a court of common law, to get, under the statute, still greater advantages from the lender; to throw upon him all the forfeitures and penalties of the act. This would be to advance the policy of the law to the full extent of what it is intended to prohibit; and to embrace the state in the forfeitures which may be recovered. He should not be allowed to use it for his own interest, exclusively, in a court of equity; by which a result follows far short of those sanctions existing in the law, to restrain and to punish what it declares to be an offence. It seems to us, that this section was intended to give to a borrower relief from an usurious contract, by an appeal to the conscience of the lender, for a discovery; when the former, from the want of all other testimony, is obliged to refer his cause to the oath of his adversary, in a bill of discovery; and that oath decides the question before the chancellor; and that it was not intended to exclude the ordinary interference of a court of equity, between borrowers and lenders in usurious contracts, to enforce the payment of the principal, and that interest which the statute itself fixes as a fair rate of compensation for the loan of money. The fact of the legislature having released the lender from all other penalties in the act, except the loss of interest, can make nothing against the construction of the statute; for that is only the consequence of the inability of every legislature in this country to compel a person to make a discovery, by which he may be subjected to legal pains, penalties or forfeitures.

The construction now given to the section is that which has been given to it by the court of appeals in Virginia, in the case of *Marks v. Morris*, 2 Munf. 407. The points decided in that case, and that particularly which has been under our consideration in this, have been questioned by judges of the same court; but the case has never been overruled. In our opinion, from an examination of all the cases since in the court of appeals, down to the case of *Fitzhugh v. Gordon*, 2 Leigh 626, the reasoning of the first is not shaken.¹

We now come briefly to consider the question whether the *complainants can have relief in equity, the transaction having been car-

¹ See *Young v. Scott*, 4 Rand. 416.

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ried into judgment. We think they cannot. The bill states the circumstances under which the judgment was confessed ; there was neither accident nor surprise. The plea of usury was withdrawn, and the judgment confessed, in the belief, by the defendants, that they might afterwards resort to a court of equity to prove the usury ; and upon the entry of the judgment, there is annexed a reservation in terms for a resort to equity. That such reservation was made by any understanding with the counsel of the plaintiff at law, is denied by him ; and the court had no authority to make it a part of the record, so as to give any benefit to the complainants. The right to resort to a court of equity for relief, under the statute, to its full extent, exists independently of any reservation of the courts of common law, when relief is asked in time. The courts of common law can neither add to nor take away from the right ; nor by any qualification of their judgments, give parties any right to be relieved from them in equity, contrary to its established principles.

We do not think, therefore, the reservation in this instance, upon the record, a matter of any consequence. The question is, can the complainants have any relief in equity against the judgment ? The general rule is, that after a verdict at law, a party comes too late with a bill of discovery. *Duncan v. Lyon*, 3 Johns. Ch. 355 ; *Barbone v. Brent*, 1 Vern. 176. There must be a clear case of accident, surprise or fraud, before equity will interfere. In the case of *Protherow v. Forman*, 2 Swanst. 227, the lord chancellor says : "If a defendant has a good legal defence, but the matter has not been tried as law, it becomes a serious question, whether a party, who, being competent, does not choose to defend himself at law, can come into equity and change the jurisdiction. Consider the effect ; he might not have succeeded at law, but by coming into equity he secures so much additional time." In the same case, the chancellor says : "Lord THURLOW was very tenacious of the doctrine, that a party who had an opportunity of a trial at law, and would not avail himself of it, could not come here." Such now is the established doctrine in England, and has been for a longer time the doctrine in the United States. And the doctrine, as applied to a case for relief from usury, is, that a defendant sued at law on a contract alleged to be usurious, will not be entitled to a bill of discovery, if he suffers a verdict and judgment to be taken against him ; and especially, when he does so, without making a defence at law. The case of *Thompson v. Berry*, *3 Johns. Ch. 395, is one directly in point ; meeting the case before us also in this, that an injunction will not be granted against a judgment, where a party seeks a discovery of usury, and claims a return of the excess beyond the legal interest. The reason of the rule is, that the proof of usury is a good defence at law ; and when it is in the knowledge of the defendant, no satisfactory reason can be given, why the discovery was not sought, while the suit was pending. It is our opinion, then, that whenever a party seeking a discovery had knowledge of the facts, during the pendency of a suit at law, equity will not permit him to do so afterwards, to enjoin a judgment. The bill will be ordered to be dismissed, and the injunction is dissolved.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in

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and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed and annulled. And this court, proceeding to render such decree as the said circuit court ought to have rendered in the premises, doth order, adjudge and decree, that the order for a perpetual injunction be and the same is hereby dissolved; and that the bill of the complainants in this cause be and the same is hereby dismissed; and that this cause be and the same is hereby remanded to the said circuit court, with directions to the said court to carry this decree into effect.

*507] *The COLUMBIA INSURANCE COMPANY of ALEXANDRIA, Plaintiffs in error, v. JOSEPH W. LAWRENCE, who survived THOMAS POINDEXTER.

Fire insurance.

There is no principle of law, or of equity, by which a mortgagee has a right to claim the benefit of a policy, underwritten for the mortgagor, on the mortgaged property, in case of loss by fire; it is not attached, or an incident, to his mortgage; it is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor.¹ The mortgagee of property insured against loss by fire, is a competent witness, in an action against the insurers to recover a loss, alleged to have been sustained by the destruction of the property insured.

One of the fundamental rules of an insurance company, insuring against loss by fire, provided, that any persons insured, sustaining a loss by fire, "shall, as soon as possible thereafter, deliver in as particular an account of their loss or damage, signed with their own hands, as the nature of the case will admit of, and make proof," &c., "and shall procure a certificate, under the hand of a magistrate," &c., "not concerned in such loss," &c., "importing that they are acquainted with the character and circumstances of the persons insured," &c.; "and until such affidavit and certificate are produced, the loss claimed shall not be payable," &c.: Held, that the words, "as soon as possible," could not be drawn down to fix the construction of the clause respecting the certificate; the true intent and meaning of it is, that the certificate must be procured within a reasonable time after the loss; it would be a most inconvenient course, to adopt a different construction, not required by the terms of the clause or the context; as it would make the material inquiry, not the production of the certificate, but the possible diligence in proving it. The assured is not entitled to receive or to sue for the loss, until the certificate is obtained; for it is a condition precedent to his right of action; the language is, "and until such affidavit and certificate are produced, the loss claimed shall not be payable;" and besides, in the body of the policy, it is expressly provided, "such loss and damage as the assured shall be entitled to receive by virtue of the policy, shall be paid within sixty days after notice and proof thereof made by the assured, in conformity to the conditions of the company, subjoined to the policy." So that it is manifest, that the assured could not be entitled to maintain any action, until he had furnished all the preliminary proofs; the delay is not injurious to the company, but solely to the assured, by depriving him of his right to judgment, until it is procured.

In a former action against the same company, by the same plaintiff, on the same policy of insurance, "a certificate," intended to be a compliance with the requirements of the ninth fundamental article in the policy, was left with the insurance company, by the assured, and no objection was made to it, at the time it was delivered, nor until after suit brought on the policy, and the case was on trial before a jury. Upon a writ of error, the judgment of the court below was reversed, for error in the instructions given by the circuit court to the jury, on the trial.

*508] The plaintiffs, on the mandate of the supreme court ordering a *venire facias de novo* "coming into the circuit court, discontinued the suit; they immediately procured and presented to the insurance company, another certificate, in precise conformity with the requirements

¹ See Carpenter v. Providence Washington Ins. Co., 16 Pet. 495.

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of the article. The court were of opinion, that under all these facts and circumstances, the non-production or the certificate, at an earlier period, was fully accounted for, and that the proper certificate was procured within a reasonable time; the first certificate was procured shortly after the loss, and presented to the company, which then made no objection to it; the objection to it was first taken at the trial in the circuit court, in the former suit; the court were then of opinion, that the previous conduct of the company amounted to evidence proper to be left with the jury, of a waiver of any objection to the certificate; the court reversed the judgment on that point; and almost contemporaneously with the annunciation of that decision, the new certificate was obtained. The non-production, then, of the proper certificate was occasioned, not by any *laches* properly imputable to the party, but by the omission of the company to give notice of the defect, and of the mistaken confidence placed by the party in the company itself.

The decision of this court in the case of *Lawrence v. Columbia Insurance Co.*, 2 Pet. 47, referred to; and the principles laid down in that case, relative to representations by the assured to the insurer, re-affirmed.

Whenever the nature of the interest of the assured would have, or might have, a real influence upon the underwriter, either not to underwrite at all, or not to underwrite, except at a higher premium, it must be deemed material to the risk; and if so, the misrepresentation or concealment of it will avoid the policy. One of the tests, and certainly a decisive test, whether a misrepresentation or concealment is material to the risk is, to ascertain whether, if the true state of the property or title had been known, it would have enhanced the premium; if it would, then the misrepresentation or concealment, is fatal to the policy.

In relation to insurances against fire on land, the doctrine seems to have prevailed, for a great length of time, that they cover losses occasioned by the mere fault and negligence of the assured and his servants, unaffected by any fraud or design.

A loss by fire, occasioned by the mere fault and negligence of the assured, or his servants or agents, and without fraud or design, is a loss within the policy, upon the general ground that the fire is the proximate cause of the loss; and also upon the ground, that the express exceptions in policies against fire, leave this within the scope of the general terms of such policies.¹

The decision of this court in 2 Pet. 26, 53, 56, as to the effect of a misdescription of property insured, on the liability of insurers against loss by fire, re-affirmed.

ERROE to the Circuit Court of the district of Columbia, and the county of Alexandria. At January term 1829, a suit between the same parties was before this court, on a writ of error. (2 Pet. 25.) It was an action instituted by Lawrence, the survivor of Lawrence & Poindexter, on a policy of insurance against fire, to recover from the Columbia Insurance Company of Alexandria, the amount of a loss sustained by them by the destruction of a mill by fire; alleged to have been duly insured by the defendants. A verdict and judgment had been rendered in favor of the plaintiff; and on the case coming into this court, the judgment of the circuit court [**509 of the county of Alexandria was reversed, and the case was remanded to that court, with directions to award a *venire facias de novo*. The mandate of this court stated, that the circuit court erred in instructing the jury, that the interest of the assured in the property insured was such as was described in the original offer for insurance and in the policy; and also in this, that the said circuit court erred in this, in the opinion to the jury, that the evidence was sufficient to be left to them, from which they might infer that the defendants waived the objections to the certificate and other preliminary proof required by the ninth rule annexed to the policy. On the coming in of the mandate, November 5th, 1830, the plaintiff in the circuit court discontinued the suit.

¹ *Cumberland Valley Mutual Protection Commercial Fire Ins. Co.*, 6 J. & Sp. 517. *Co. v. Douglas*, 58 Penn. St. 419; *O'Brien v.*

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In September 1831, Joseph W. Lawrence, survivor of Lawrence & Poindexter, instituted another suit against the same defendants, on the same policy of insurance ; and after various pleadings and demurrers, &c., the case was tried by a jury, in October 1834, and a verdict and judgment entered for the plaintiff. The defendants excepted to the charge of the court, in two bills of exceptions ; and they prosecuted this writ of error. The case brought up by this writ of error was in all respects the same with that which was before the court in 1829 ; with the exceptions fully stated in the opinion of the court.

The case was argued by *Jones*, for the plaintiffs in error ; and by *Swann* and *Berry*, for the defendant.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia, for the county of Alexandria. The original action was *assumpsit*, brought by the defendant in error against the insurance company, upon a policy of insurance against fire, underwritten by the company, on the 9th of April 1823, whereby the company insured for the defendant in error, and his partner, Poindexter (since deceased), \$7000 on their stone mill, called the Elba mill, four stories high, situated on an island about a mile from Frederickburg, in Virginia. The declaration averred a total loss by fire, on the 14th of February 1824.

*510] There was a former suit brought on the same policy, against the company, in which the plaintiff obtained a verdict and judgment. That judgment was brought before this court on a writ of error, in January term 1829, and the judgment was reversed. The cause will be found fully reported, with the grounds of the reversal, in the second volume of Peters' reports. (2 Pet. 26, *et seq.*) One of the grounds of that reversal was, the omission, before the suit was commenced, to procure a certificate from a magistrate, in compliance with the ninth fundamental article of the rules of the company, upon which the policy was made, and to which those rules were annexed, as a part of the conditions of the contract. On the 14th of February 1829 (after the reversal, and the reasons thereof were made known), being five years after the loss, a new certificate was obtained from Mr. Hooe, a magistrate of the county in which the mill was situated. The original suit was afterwards discontinued in the circuit court, on the 5th of November 1830. The present suit was afterwards commenced in September 1831.

In the court below, various pleas were interposed by the company, upon some of which there were issues to the country, and others, which were special, eventuated in demurrers. Upon the former, a verdict was, at the trial, found for the plaintiff ; and upon the latter (as well as upon the verdict), judgment was ultimately pronounced in favor of the plaintiff. Bills of exception were also taken at the trial, upon various points of law raised in argument ; and the correctness of the ruling of these points, raised both upon the special pleadings and upon the trial of the issues of fact, are, upon the present writ of error, brought before us for revision. All the leading facts of the case, except the new certificate of Hooe, before mentioned, and the testimony of Joseph Howard (which will hereafter be a subject of comment, upon the inquiry as to his competency), are precisely the same as were before us upon the writ of error in 1829. And as the testimony of Howard,

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if admissible, does not, in our opinion, at all vary the operation and pressure of the point of law in the case, we deem it unnecessary to do more than to refer to the case, as reported in 2 Peters, for all the material facts. It may be proper, however, to state, that it was then decided, that there was no waiver by the company of their right to the preliminary proofs, required by the ninth article of their rules, and that the assured had an insurable interest.

In examining the case presented by the present writ of error, we shall endeavor to strip it of the artificial and complicated form, in which it comes before the court ; and instead of wandering through the [*511 maze of special pleadings and exceptions, with which the merits of the case are incumbered, and under which, indeed, they seem almost buried, we shall consider the material questions presented by the record, and afterwards briefly apply the decisions on them to the solution of the points raised by the pleadings and exceptions.

The first question naturally presented is, whether Joseph Howard was a competent witness in the suit. The original defendants (the insurance company) objected to his competency ; and the objection was overruled, and his testimony was admitted by the court. The facts relied on to establish his incompetency were these : Howard and Lawrence (the plaintiff) had, in September 1813, purchased the premises of W. & G. Winchester ; and in the conveyance, it was declared, that it was subject to the payment of the annual rent of \$07, and also to the payment of \$6695, the balance of the purchase-money due to the grantors, agreeable to certain notes given therefor by Howard & Lawrence ; and that the same sum of \$6695, and the accruing interest, should be a lien on the premises, in the same manner as if a mortgage had been executed therefor. Howard & Lawrence, in May 1814, executed a deed of trust to W. J. Roberts, on the premises, to secure certain indorsers upon their notes at the Bank of Virginia, and the Farmers' Bank at Frederickburg. In July 1818, Howard made an agreement with Lawrence to convey the premises to him, at the price of \$30,000 ; to which amount Lawrence was to procure a release of debts due from Howard & Lawrence, and then Howard was to make a conveyance of his moiety of the premises to Lawrence, subject to the liens given to the banks (hereinafter mentioned), and to Winchester ; and also the ground-rent, &c. Lawrence, in November 1822, entered into a contract with Poindexter, by which the latter became interested in a moiety of the premises, and became liable to the payment of a moiety of the debts due by Howard & Lawrence to the Bank of Virginia, and the Farmers' Bank, at the Frederickburg branches, for which Howard & Lawrence had executed the deed of trust to Roberts ; and also for the debt to Winchester, for which there was a mortgage or lien on the premises. Lawrence & Poindexter, in February, 1824, assigned the present policy on the premises to Roberts, by an instrument, which states no purpose, but merely says, "that for value received, they do assign the policy to Roberts ;" to whom the said property has been conveyed, in trust for certain purposes. It may be inferred, that the object *was to [*512 subject the rights and interest secured by the policy to the trust.

It is admitted, that all these bank debts of Howard & Lawrence have been discharged, and all the liability to all their indorsers, except John Mundell, deceased, who, as executor, has, by a release under seal, released Howard from all liability, by reason of the indorsements of his testator.

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It is suggested, that this release is inoperative in point of law ; because it is not competent for an executer to release such a liability to his testator. We are of a different opinion, if the transaction was *bond fide* and for a sufficient consideration ; and there is no evidence to disprove either. So that the deed of the trust has become completely *functus officio* ; and Howard, as to the bank debts, has no interest whatsoever, to be affected by the assignment of the policy. The debt to the Winchesters of \$6695, yet remains due and unpaid ; and as to this, it is insisted, that there is a remaining interest in Howard, who is personally liable to the payment of it ; and the proceeds of the policy, if recovered, will go, *pro tanto*, in discharge of that debt. Assuming that Howard is personally liable for that debt, still, unless the creditors have not merely a lien on the premises, but a lien on the policy for it, Howard has no interest, which renders him incompetent in this suit. Now, we know of no principle of law or of equity, by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor on the mortgaged property, in case of a loss by fire. It is not attached, nor an incident, to his mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor. Lord Chancellor KING, in *Lynch v. Dalzell*, (8 Bro. P. C. 497. s. c., 2 Marsh. on Ins. b. 4, ch. 4, p. 803), took notice of this distinction, saying, "these policies are not insurances of the specific things (goods) mentioned to be insured ; nor do such insurances attach to the realty, or in any manner go with the same, as incident, by any conveyance or assignment ; but they are only special agreements with the persons insured against such loss or damage as they may sustain." So that, in this view, we are of opinion, that Howard was a competent witness and properly admitted by the court below. We have already said, that we do not perceive, that the testimony given by Howard, changes in any material respect the legal posture of the case. The first exception of the insurance company was therefore, properly overruled.

*513] *The next question which arises is, as to the proper construction of the ninth article of the fundamental rules of the insurance company. That article is in the following terms : "All persons assured by this company, sustaining any loss or damage by fire, are forthwith to give notice to the company ; and, as soon as possible thereafter, deliver in as particular an account of their loss or damage, signed with their own hands, as the nature of the case will admit of, and make proof of the same, by their oath or affirmation, and by their books of accounts, or proper vouchers, as shall be reasonably required ; and shall procure a certificate, under the hand of a magistrate or a sworn notary of the town or county in which the fire happened, not concerned in such loss, directly or indirectly, importing that they are acquainted with the character and circumstances of the person or persons insured ; and do know, or verily believe, that he, she or they, really and by misfortune, without any kind of fraud or evil practice, have sustained, by such fire, loss or damage to the amount therein mentioned ; and until such affidavit and certificate are produced, the loss claimed shall not be payable : also, if there appears any fraud, the claimant shall forfeit his claim to restitution or payment by virtue of his policy."

It is contended on the part of the company : first, that the certificate from a magistrate, here provided for, is to be procured "as soon as possi-

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ble;" and that these words in the preceding clause are to be drawn down and construed to belong to the latter clause, so as to read, "and shall, as soon as possible, procure a certificate, &c." And secondly, if this construction be not adopted, still that the certificate must be procured within a reasonable time; and that the procurement of it, after five years from the time of the loss, is not a reasonable time.

We are of opinion, that the words "as soon as possible," cannot be drawn down to fix the construction of the clause respecting the certificate. We think, the true intent and meaning of it is, that the certificate must be procured within a reasonable time after the loss. It would be a most inconvenient course, to adopt a different construction, not required by the terms of the clause, or the context, as it would make the material inquiry, not the production of the certificate, but the possible diligence in proving it. The assured is not entitled to receive or to sue for the loss, until the certificate is obtained; for it is a condition precedent to his right of action. The language is, "and until such affidavit and certificate are produced, *the loss claimed shall not be payable." And besides, in the body [*514 of the policy, it is expressly provided, "such loss and damage as the assured shall be entitled to receive by virtue of the policy, shall be paid within sixty days after notice and proof thereof made by the assured, in conformity to the conditions of the company, subjoined to the policy." So that it is manifest, that the assured would not be entitled to maintain any action, until he had furnished all the preliminary proofs; so that the delay is not injurious to the company, but solely to the assured, by depriving him of his right to judgment until it is procured.

The next inquiry is, whether the new certificate was procured within a reasonable time. In the ordinary course of things, upon a trial before the jury, this would be a mixed question of fact and law; of law, where all the facts and circumstances were admitted or established; of fact, where these circumstances were open for the ascertainment of the jury. In the present case, the question is directly made upon a full display of all the facts and circumstances, in the special pleadings. We are of opinion, that under all these facts and circumstances, the non-production of the proper certificate at an earlier period, is fully accounted for; and that the proper certificate was procured within a reasonable time. The first certificate was procured shortly after the loss, and presented to the company, which then made no objection to it. The objection to it was first taken at the trial in the circuit court, in the former suit. The court were then of opinion, that the previous conduct of the company amounted to evidence, proper to be left to the jury, of a waiver of any objection to the certificate. This court reversed the judgment on that point; and almost contemporaneously with the annunciation of that decision, the new certificate was obtained. The non-production, then, of the proper certificate, was occasioned, not by any *laches* properly imputable to the party, but by the omission of the company to give notice of the defect, and of the mistaken confidence placed by the party in the company itself.

If the company had contemplated the objection, it would have been but ordinary fair-dealing, to have apprised the plaintiff of it; for it is now obvious, that the defect might have been immediately supplied. As it was, the company, unintentionally, it may be, by their silence, misled him. The

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delay to procure the correct certificate was not unreasonable. This view of the matter disposes of the fourth plea.

*That plea is substantially defective, in averring, that the ninth [515] article of the fundamental rules required the certificate to be procured "as soon as possible," after the loss, and is a legal misconstruction of that article, and is, in other respects, objectionable, as attempting to put double matters in issue. The replication set forth all the circumstances, which establish due diligence in procuring the certificate within a reasonable time; and if it be bad, for the want of a proper traverse, and for any other cause set forth in the special demurrer, it leads us back to the first error, viz., a bad plea to a good declaration. This view of the matter also disposes of the first, second and third instructions, asked of the court in the second bill of exceptions, and founded upon the supposed bar of the statute of limitations, and the certificate not having been procured in a reasonable time.

The next question which arises is, whether there has been, in the proposal for the insurance, a misrepresentation of the interest of the assured in the property insured; and if there has been, whether, if that misrepresentation is material to the risk, and would have enhanced the premium, it avoided the policy. The proposal for insurance describes the property and interest thus. "What premium will you ask to insure the following property, belonging to Lawrence & Poindexter, for one year, against loss or damage by fire, on their stone mill, four stories high, covered with wood, situate, &c." It was decided by the court, in the former case, in 2 Pet. 47, &c., that the real interest existing in Lawrence & Poindexter, at the time of the proposal, was not such as is described therein. It was further decided by the court, in the same case, that a misrepresentation of the interest of the assured, which is material to the risk, would avoid the policy. The language of the court on that occasion was: "The contract of insurance is one in which the underwriters generally act on the representation of the assured; and that representation ought, consequently, to be fair, and to omit nothing which it is material for the underwriters to know. It may not be necessary, that the person requiring insurance should state every incumbrance on his property, which it might be required of him to state, if it was offered for sale. But fair-dealing requires, that he should state everything, which might influence, and probably would influence, the mind of the underwriter, in forming or declining the contract, &c. Generally speaking, insurances against fire are made, in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested [516] by his *interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk, or in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles, as on the interest of the assured; and it would seem, therefore, to be always material, that they should know how far this interest is engaged in guarding the property from loss."

We think this reasoning entirely satisfactory, and founded in the true exposition of the contract of insurance. Whenever the nature of this interest would have, or might have, a real influence upon the underwriter, either not to underwrite at all, or not to underwrite, except at a higher

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premium, it must be deemed material to the risk ; and if so, the misrepresentation or concealment of it will avoid the policy. One of the tests, and certainly, a decisive test, whether a misrepresentation or concealment is material to the risk, is to ascertain, whether, if the true state of the property or title had been known, it would have enhanced the premium. If it would, then the misrepresentation of concealment is fatal to the policy. Now, at the trial of the present case, the counsel for the insurance company, in their second bill of exceptions, prayed the court to instruct the jury, that if they "find from the evidence, that a full disclosure of the actual title of the insured in the premises, as it existed at the time, was material to, and would have considerably increased the estimate and value of the risk and premium, and that no other disclosure of the same was made than as aforesaid (*i. e.* in the offer of insurance), then there was a material concealment, which avoids the policy." The court, being divided in opinion, did not give this instruction to the jury ; and it was consequently refused. In our opinion, upon the principles already stated, it ought to have been given ; and the refusal was an error for which the judgment must be reversed. But the court rightly rejected the instructions upon the same subject asked in the first bill of exceptions, which proceeded upon the ground, that if there was any misrepresentation of the interest of the assured, that alone, whether material or not to the risk, would avoid the policy. The instruction asked upon the same subject, in the second bill of exceptions, is still more objectionable ; as it called upon the court to declare to the jury, as matter of law, that the non-disclosure of the true nature and extent of the title and interest of the assured in the premises, was a concealment of circumstances materially affecting the risk, which avoided the policy ; *thus taking [*517 from the jury the proper examination of the fact, whether it was material to the risk or not.

The next question is, whether a loss by fire, occasioned by the fault and negligence of the assured, their servants and agents, but without fraud or design on their part, is a loss for which the underwriters are liable. In regard to marine insurances, this was formerly a question much vexed in the English and American courts. But in England, the point was completely settled in *Busk v. Royal Exchange Insurance Company*, 2 Barn. & Ald. 82, upon the general ground, that *causa proxima non remota spectatur* ; and therefore, that a loss, whose proximate cause is one of the enumerated risks in the policy, is chargeable to the underwriters ; although the remote cause may be traced to the negligence of the master and mariners. Although, in the policy, in that case, the risk of the barratry was also assumed by the underwriters ; yet it is manifest, that the opinion of the court proceeded upon the broad and general ground. The same doctrine was afterwards affirmed in *Walker v. Maitland*, 5 Barn. & Ald. 171, and *Bishop v. Pentland*, 7 Barn. & Cres. 219, and is now deemed incontrovertibly established. The same doctrine was fully discussed and adopted by this court in the case of the *Patapsco Insurance Company v. Coulter*, 3 Pet. 222.

In relation to insurances against fire on land, the doctrine seems to have prevailed, for a great length of time, that they cover losses occasioned by the mere faults and negligence of the assured and his servants, unaffected by any fraud or design. In the arguments of counsel on marine policies, it

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has constantly been taken for granted, both in England and America ; (a) and although there is no case directly on the point, decided by the highest authority ; yet Lord Chief Justice GIBBS, at *nisi prius*, held, that if a servant by negligence sets a house on fire, the loss is recoverable on a policy against fire. Indeed, if such losses were not within such policies, the indemnity against such risks would be practically of little importance ; since much the larger number of fires of this sort may be traced back to some negligence, slight or otherwise, of the members of families. The language of fire policies, too, abundantly justifies this conclusion, upon the common principles of interpretation. The underwriters agree to pay "all loss or damage," which the assured may sustain by fire *upon the property insured ; but they [518] except from his general liability any loss or damage sustained by fire "that may happen or take place in consequence of any invasion, civil commotion, riot or any military usurpation :" and the fundamental rules also exclude losses by earthquakes and hurricanes. The exception, then, may fairly be construed to leave all other losses, except fraudulent losses, within the reach of the policy, upon the known maxim of law, that an exception expressly carved out of a general clause, leaves all other cases within the scope of the clause. Fraudulent losses are necessarily excepted, upon principles of general policy and morals ; for no man can be permitted, in a court of justice, to allege his own turpitude as a ground of recovery in a suit. And indeed, the ninth article of the fundamental rules is manifestly intended to secure the company against losses "by fraud or evil practice." We are then of opinion, that a loss by fire, occasioned by the mere fault and negligence of the assured, or his servants or agents, and without fraud or design, is a loss within the policy, upon the general ground, that the fire is the proximate cause of the loss ; and also upon the ground, that the express exceptions in policies against fire leave this within the scope of the general terms of such policies. The sixth plea is, therefore, bad in substance.

The next question which arises is, upon the supposed misdescription of the premises in the proposal for insurance, and the effect of that misdescription. It was decided by this court, in the former case, in 2 Pet. 26, 53, 56, that the misdescription of the premises (not fraudulently made) to be such as would vitiate the policy, must, upon the true construction of the fundamental rules of the company, not only be material to and increasing the risk, but such as would occasion the insurance to be made at a lower premium than would otherwise be demanded. If, therefore, the misdescription were material to the risk, and would increase it, but yet would not reduce the premium, it would not avoid the policy. And that the points as to the misdescription, as well as the effect thereof upon the premium, were matters of fact for the consideration of the jury. We are entirely satisfied, that this is the true construction of the terms and intent of the fundamental rules. Upon this ground, we are of opinion, that the fifth plea is bad in substance ; for it puts the case wholly upon the materiality of the misdescription to the risk, without any reference to the premium. The last instruction asked by the counsel of the company, in the bill of exceptions, propounds the point

(a) See *Busk v. Royal Exchange Insurance Company*, 2 Barn. & Ald. 82 ; and *Grim v. Phoenix Insurance Company*, 18 Johns. 451.

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in a *somewhat different form. It is, "that if the jury find, from the evidence, that the construction of the building, &c., was grossly misrepresented in the offer and policy, and instead of being a building with walls of stone, and with a covering or roof only of wood, the walls themselves were partly of wood, and that such actual construction of the building greatly increased the risk beyond what the insurers would have incurred, if the building had truly answered the description in the said offer and policy, then the jury ought to presume, that the building was charged in the said policy at a lower premium than would otherwise have been demanded by the defendants, so as to bring the case within the operation of the last clause of the first of said fundamental rules." If this instruction had merely asked, that the jury might presume, or were at liberty to presume, &c., upon the facts and circumstances so stated, there would not have been any just objection to it. But it goes much farther, and insists that the jury "ought to presume," &c., which, in truth, is removing the whole matter of fact from the jury, and compelling them to decide the point as a conclusive presumption of law. This, we are of opinion, would have been wholly unjustifiable on the part of the court. The instruction called upon the court to decide, not upon a conclusive presumption of law, but upon a mere presumption of fact, a matter, which exclusively belonged to the jury to consider and resolve; it is directly in the face of the decision in 2 Pet. 55-6, upon this very point. It is obvious, from the very terms of the rules, that cases may exist, in the same class of hazards, of very different degrees of risk, from the nature and qualities of the thing insured, and yet may not increase or diminish the premium. Whether the misdescription would have any effect upon the premium must, therefore, from the very nature of the inquiry, be a matter of fact, upon all the circumstances of each particular case. The instruction prayed was, therefore, properly rejected.

The judgment of the circuit court must be reversed for the error already stated; and the cause be remanded, with directions to the court to award a *venire facias de novo*.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is the opinion of this court, that *there was error in the circuit court in refusing to give to the jury the [*520 following instruction, in the second bill of exceptions mentioned, on the prayer of the counsel for the said insurance company, viz: "If the jury find, from the evidence, that a full disclosure of the actual title of the insured in the premises, as it existed at the time, was material to and would have considerably increased the estimate and value of the risk and premium, and that no other disclosure of the same was made than as aforesaid, then there was a material concealment which avoids the policy." It is, therefore, considered and adjudged by this court, that for the error aforesaid, the judgment aforesaid be and hereby is reversed; and that the same be remanded to the circuit court, with directions to award a *venire facias de novo*.

*THOMAS STANLEY, Appellant, v. JOHN GADSBY, ALEXANDER MINTYEE and GEORGE CONER, Executors of JAMES WALKER, deceased, and JAMES RHODES.

Usury.—Injunction.

A. filed a bill in the circuit court, for an injunction, to prevent the sale of property by a trustee, to whom it had been conveyed to secure the payment of a sum of money borrowed by him at usurious interest; the money borrowed had not been repaid, and the bill sought no discovery of the usury from the defendant, but averred that the complainant would be able to prove it by competent testimony; the circuit court dismissed the bill: *Held*, that the decree of the circuit court was correct.

This is substantially an application for relief from usury; and the consequence of granting the injunction would be, relief upon terms at variance with the rule of equity, so fully recognised at this term of the court, in case of *Brown v. Swann*, that he who seeks the aid of equity to be delivered from usury, must do equity, by paying the principal and legal interest upon the money borrowed. The complainant does not offer to do so in this bill; this is essential to every such application in a court of equity: first, to give the court jurisdiction; and to enable the chancellor, if he thinks proper to do so, to require the payment of principal and interest before the hearing of the cause. The relief sought in such cases in an exemption from the illegal usury; the whole inquiry on the hearing, is to establish that fact, and to give relief to that extent; whenever a complainant does not comply with the rule, by averring in his bill his readiness or willingness to pay principal and interest, he can have no standing in a court of equity.

APPEAL from the Circuit Court of the District of Columbia, and county of Washington. This was a bill filed in the circuit court, by the appellant, against the executors of James Walker, praying for an injunction on a trustee, to prevent his proceeding to sell certain real estate, conveyed to him to secure the payment of a sum of money loaned to the complainant; and for relief against an alleged usurious contract. The circuit court dismissed the bill. The case is fully stated in the opinion of the court.

The case was submitted to the court, without argument, by *Swann*, for the appellants; and by *Coxe*, for the appellees.

WAYNE, Justice, delivered the opinion of the court.—This is an appeal from the circuit court of the United States for the district of Columbia, and [522] for the county of Washington. *The complainant alleges, that he borrowed a sum of money from James Walker, at usurious interest; and that to secure the payment of it, he executed a deed of trust upon his house and lot, in Washington, to the defendant, James Rhodes; in which he covenanted, if default should be made in the repayment of the loan, at the stipulated time, that the trustee, Rhodes, shall, upon the request of said James Walker, or his executors, administrators or assigns, sell the premises to the highest bidder, and convey the same to a purchaser in fee-simple: notice of the sale being given, of the time of sale, in the way mentioned in the deed of trust. He further complains, that the executors of Walker have directed Rhodes to proceed to a sale of the house and lot; that he had advertised them for sale; and he admits, that he had not repaid the money borrowed. The complainant seeks no discovery of the usury from the defendant; but avers that he will be able to prove it by competent testimony, and waives all penalties, to which he may be entitled, to arise out of this transaction. He prays for an injunction to prevent the sale of the property by the trustee, until the question of usury shall be decided at law;

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but does not ask the court to aid in any way as auxiliary to any case pending at law.

This, then, is substantially an application for relief from usury; and the consequence of granting the injunction would be relief upon terms at variance with the rule of equity, so fully recognised at this term of the court, in the case of *Brown v. Swann* (*ante*, p. 497); that he who seeks the aid of equity, to be relieved from usury, must do equity, by paying the principal and legal interest upon the money borrowed. The complainant does not offer to do so in his bill. This is essential to every such application in a court of equity: first, to give the court jurisdiction, and to enable the chancellor, if he thinks proper to do so, to require the payment of principal and interest, before the hearing of the cause. The relief sought in such cases is an exemption from the illegal usury; the whole inquiry on the hearing is to establish that fact, and to give relief to that extent. Whenever, then, a complainant does not comply with the rule, by averring in his bill, his readiness or willingness to pay principal and interest; he can have no standing in a court of equity. The decree of the circuit court is affirmed.

THIS cause came on to be heard, on the transcript of the record *from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was [*523 argued by counsel: On consideration whereof, it is decreed and ordered by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

*JOHN DENN, Lessee of CHARLES C. SCOTT and others, v. THOMAS REID, JUN., and others. [*524

Recording of deeds.

Construction of the acts of the legislatures of North Carolina and Tennessee, relative to registering and recording deeds for land, in force in the state of Tennessee.

CERTIFICATE of Division from the Circuit Court of West Tennessee.

This case was submitted to the court, on a printed argument, by Mr. Leigh.(a)

MCLEAN, Justice, delivered the opinion of the court.—The plaintiffs in this case, brought an action of ejectment against the defendants, in the

(a) The following order was made in this case:

Lessee of Charles C. Scott, et al., Plaintiffs in error, v. Thomas Reid, Jr., et al. Whereas, upon an inspection of the printed argument of Thomas Washington, Esq., of counsel for the plaintiffs in error in this cause, it appears to the court, that some of the passages thereof, and more particularly those on pages 112, 118, 114, 115, 117, 118, 119, 122, 123, 124, 125, 126, 130, 131, 132, 134, 145, 146 and 150, are reflecting on a member of the court, and thereby disrespectful to the whole court: It is therefore now here ordered by this court, that the said passages or parts of said argument, and all others which may be deemed disrespectful to any member of the court, be and the same are hereby stricken out; and that this order be entered on the minutes of this court.

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circuit court for the district of West Tennessee ; and on the trial, certain questions were made to the court, in which the opinions of the judges were opposed ; and these questions have been certified to this court for their decision.

To sustain their action, the plaintiffs offered in evidence, a grant for 5000 acres of land to Stokely Donelson, from the state of North Carolina, dated the 7th day of April 1790. This grant was duly authenticated under the seal of the state of North Carolina, and the certificate of the governor ; the certificate was registered in Giles county, in the state of Tennessee, within which the land is situated, on the 10th of December 1810. And both the grant and certificate appear to have been registered in the same county, on the 2d of June 1817. The plaintiffs then offered to read a deed for the same land, from Stokely Donelson to John Hook, of the state of Virginia, dated the 24th of March 1791. On the 29th of March 1799, this deed was acknowledged by the grantor, before David Campbell, one of the judges of the state of Tennessee ; and on the 16th of April 1799, it was registered in the county of Davidson. It was proved, that when this deed was executed and registered, and until the fall of 1818, the Indian title to the land was not extinguished ; and that the county of Giles was not established until 1809 ; but the law organizing the county did not take effect until January 1810.

*Upon these facts, was this deed offered by the plaintiffs, and *525] objected to by the defendants, on the ground, that it had not been duly acknowledged and registered ; and upon this question, the opinions of the judges were opposed ; and this constitutes the first point for examination and decision by this court.

In the state of Tennessee, until a deed is clearly proved and registered, the fee does not pass to the grantee ; and to this rule may, in some degree, be attributed the numerous legislative acts of the state, to cover defective cases of proof and registration of deeds. By the act of 1715, adopted by Tennessee from North Carolina, it is provided, that " no conveyance or bill of sale for lands, or what manner or form soever drawn, shall be good and available in law, unless the same shall be acknowledg'd by the vendor, or proved by one or more evidences, upon oath, and registered by the public register of the county where the land lieth ; and all deeds so done and executed, shall be valid, and pass estates," &c. By the act of the 30th of September 1794, it was provided, "that all deeds and mesne conveyances of lands, tenements and hereditaments, not already registered, acknowledged or proved, shall and may, within two years after the passing of this act, be acknowledged by the grantor, or proved by one or more of the subscribing witnesses, and registered in the county where the land lies," &c. On the 27th of October 1797, this act was extended until the termination of the next general assembly of the state ; and before the expiration of this extension, the deed under consideration was proved and registered in the county of Davidson.

There is no objection as to the proof of the deed, by the acknowledgment of the grantor before Judge Campbell ; but it is admitted, there was no law which authorized its registration in the county of Davidson ; and unless such registration has been sanctioned by a subsequent law, the deed is not valid. It is contended, that this registration is made good by

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. the third section of the act of the 23d of November 1809, which provides, "that all deeds for the absolute conveyance of any real estate within this state, to which the Indian title was not extinguished, at the time of the execution of such deed, and at the time of the registration of the same, as hereinafter mentioned, which deed shall have been proved by one or more of the subscribing witnesses thereto, in any court of record, or before any judge of the superior courts in the state, or shall have been so proved before any court of record or any *judge of a court, or mayor of a city, out of this state, and shall have been registered in any county in this state, within the time required for the probate and registration of deeds; such probate and registration shall be sufficient to entitle such deed or deeds to be read in evidence, in any court within this state; and shall also be sufficient to entitle such deed or deeds to registration in the county or counties where said land may lie, when the Indian title is extinguished thereto." That the deed to Hook is embraced by the provisions in this statute, in two particulars, is clear. It calls for land to which the Indian title was not extinguished, when the deed was proved and registered, nor indeed, until nine or ten years after this act was passed. And it appears, that it was registered in the county of Davidson, "within the time required for the probate and registration of deeds." In these respects the deed comes within the statute.

But it is objected, that the statute makes provision for such deeds only, as "have been proved by one or more of the subscribing witnesses thereto, in any court of record, or before any judge of the superior courts of the state; and that the deed to Hook was not proved by one or more of the subscribing witnesses, but by the acknowledgment of the grantor. That Judge Campbell, who took the acknowledgment, had power to take the proof by the subscribing witnesses; but, as the proof was not made by one or more of the subscribing witnesses, it is contended, the probate was not such as contemplated by the statute, and, of course, that the deed is not within it. This construction, the counsel for the plaintiffs contend, is an extremely technical one, and ought not to be given to a remedial statute. That the object of the legislature was to provide for deeds which had been duly proved and registered in any county in the state, calling for lands covered by the Indian title, and not within any organized county. And that such a construction should be given to the statute, as shall effectuate the intentions of the legislature.

That this was the design of the statute, seems to be probable; and it should be so construed as to produce this effect, unless the language of the act shall forbid it. A deed embraced by the statute is made evidence; that is, evidence of title; and is good against all other subsequent conveyances from the same grantor, unless it should be in a case where the *grantee had failed to record the deed in the county where the land lies, within a reasonable time after the extinguishment of the Indian title, and against a purchaser without notice. The counsel insist, that this statute will admit of being read, "which deeds shall have been proved by one or more of the subscribing witnesses thereto, in any court of record;" or, "which shall have been acknowledged before any judge of the superior courts in the state." This is not the import of the words, nor does it accord with a grammatical construction of them. The mode of proof required is, by one or

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more of the subscribing witnesses to the deed ; and applies as well to the proof taken before the "judge of the superior courts," as before any court of record. And the correct and grammatical reading of the sentence is, "which deeds shall have been proved by one or more of the subscribing witnesses thereto, in any court of record :" or, "which shall have been proved by one or more of the subscribing witnesses thereto, before any judge of the superior courts in the state."

This, it must be admitted, when we consider the mischief the law was probably intended to remedy, is a somewhat technical construction of the act ; and cases may be found, where courts have construed a statute most liberally to effectuate the remedy ; but where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. Where the language of the act is not clear, and is of doubtful construction, a court may well look at every part of the statute—at its title, and the mischief intended to be remedied in carrying it into effect. But it is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions. We are unable to say why the benefits of this statute were given to those who held under deeds proved by the subscribing witnesses, and withheld from those whose deeds were proved by the acknowledgment of the grantor. In most cases, if not in all, proof by acknowledgment would be deemed more satisfactory than by witnesses ; but the legislature having made a distinction between the cases ; whether it was intentional or not, reasonable or unreasonable ; the court are bound by the clearly-expressed language of the act.

It is unnecessary to follow the train of argument used by the counsel for the plaintiffs on this subject ; as, in the opinion of the *court, [528] the provisions of the act of 1821 apply to the case. In the latter part of the second section of this act, it is provided, that "in all cases where a deed of conveyance of land has been acknowledged before a judge of the late superior courts of law and equity, or before any court of record in this state, and since registered in any register's office in this state ; or where the privy examination of a *feme covert*, through whom the title is derived, has been taken before any court of record and certified, and such deed registered in the proper county ; such deed, or an authenticated copy thereof, may be read in evidence, and shall be deemed sufficient to pass the title ; provided, that no person claiming by a conveyance under the same title, shall be affected thereby." These provisions embrace two descriptions of cases. The first one, which it is supposed covers the deed to Hook, is, where a deed has been acknowledged before a judge and registered in any register's office in the state ; and the other, where the privy examination of a *feme covert*, through whom the title is derived, has been taken before a court of record and registered in the proper county. But in neither of these cases, shall the title be held good against a person claiming under the same title.

It must be admitted, that the language of this section does not so clearly express the intention of the legislature as it might have done ; but it is susceptible of the construction, that the deed which is required to be registered in the proper county, is the deed that conveys the title of the *feme covert*.

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To extend this requirement, by construction, to the deed first named, would make the provision contradictory, if not absurd. The first deed, if registered in any register's office in the state, is made evidence of title; and it could hardly be required, in the same sentence, that the same deed should have been recorded, without any reference to the time, "in the proper county;" and this followed by a provision, that "no person claiming by a conveyance under the same title, shall be affected thereby." It may be, that the circumstances under which this law was passed, if known, might induce us, if we were at liberty to be influenced by them, to give a different construction to this provision; but being alone guided by the language of the section, we think this construction does no violence to the words, but gives to them their fair import. It was proved, that the deed to Hook covered the land in controversy; and we think it was properly admitted as evidence of title.

*The evidence on the part of the plaintiffs being closed, the [**529 defendants offered a deed from Stokely Donelson to James Conner, for the same land, dated the 8th of December 1797. On the 23d of August 1809, this deed was proved in Rowan county, North Carolina, by one of the subscribing witnesses, before Francis Locke, one of the judges of the superior courts, &c., of the state. This deed was registered in the county of Giles, on the 3d of June 1817. And the defendants, to prove that they were purchasers of the land in controversy under James Conner, offered in evidence a deed from Conner to Reid and Butler, for 4500 acres, dated the 1st of June 1822; also, several other deeds from the same person, for smaller tracts of land within the patent of Donelson; all of which deeds were proved and registered in Giles county. These deeds were all signed by Henry W. M. Conner, agent and attorney in fact for James Conner; but no evidence of his authority to act as attorney was offered. And the defendants examined John Bornet, a witness who stated, that Thomas Reid, jun., Thomas Butler, William Collins, &c., were living on the tract in controversy, in April 1821; and other tenants were proved to be in possession of different parts of the land, and for different periods of time; and the witness proved, that several of the tenants purchased from Conner. And similar facts were proved by James Kimbro, another witness. And on the question, whether the deed from Stokely Donelson to James Conner was regularly proved and registered; and whether the evidence contained in the deposition of John Bornet and James Kimbro, conduced to show the defendants purchased or claimed under Conner; the judges were divided in opinion.

We will first examine as to the regular proof and registration of the deed from Donelson to Conner. By the act of the 30th of November 1807, all deeds executed out of the state were required to be acknowledged by the grantor, or proved by two or more subscribing witnesses, and registered within two years; and deeds which had been executed, but not registered, were required to be registered within a year after the 1st day of January following. And afterwards, the act of 22d of April 1809, continued the above provision for the registration of deeds. This law was in force when the deed from Donelson to Conner was attempted to be proved in North Carolina; but as that proof *was made by one witness only, it was [**530 not regular; and, of course, did not authorize the registration of the

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deed. And it is believed, that no law has been since passed which gives effect to such a probate taken out of the state.

The act of 1822, which provides for deeds that had been executed out of the state, and which shall have been proved by one or more of the subscribing witnesses, were required to be certified by the clerk of the court, &c.; and this deed has not been so certified. The probate not having been regular, at the time it was taken, nor made so by any subsequent law, it follows, that the registration of this deed in the county of Giles can give no effect to it. It cannot be received as evidence of title; and whether it could be considered as giving to the tenant the benefit of the statute of limitations, it is not necessary to determine, as the point is not raised.

The deeds which purport to have been executed by Henry W. M. Conner, as agent and attorney in fact for James Conner, cannot be received as evidence for any purpose, in the absence of the proper authority by the agent. And it is clear, that the evidence of Bornet and Kimbro does not, under the circumstances of this case, in the language of the adjourned question, conduce to show the defendants purchased under Conner. This evidence, to avail the defendants under the statute, must be by deed, and not by parol. The tenant who relies upon the statute of limitations, in virtue of his own right as a purchaser, must claim by deed. His possession under another, who claims by deed, may be insisted on, under the statute, to protect the rights of the grantee. But Conner is not made defendant in this case; and if his deed were admissible, to sustain the plea of the statute, the defence must be made for his benefit, and not the benefit of the tenants. The purchasers from Conner do not show a deed, or any other instrument in writing which is evidence of their purchase; nor do they connect themselves with any title which gives to them the benefit of the statute, so far as the case is brought before us by the adjourned questions. The deed from Gallagher, under which Reid claims, is not before us.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of West Tennessee, and on the points and questions on which the judges of the said circuit court were opposed in opinion, and which were *certified to this court for [531] its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, this court is of opinion, on the first question so certified, that the deed from Donelson to Hook should be admitted as evidence of title, being proved and registered according to the laws of Tennessee; and on the second question so certified, it is the opinion of this court, that the deed from Stokely Donelson to James Conner cannot be received as evidence; and that the evidence of Bornet and Kimbro does not, under the circumstances of the case, conduce to show that the defendants purchased under Conner: whereupon, it is ordered and adjudged by this court, that it be so certified to the said circuit court.

***GEOEGE PETER**, Executor of **DAVID PETER**, deceased, The **BANK of COLUMBIA** and The **BANK of the UNITED STATES**, Appellants, v. **JAMES B. BEVERLY** and wife, and **WILLIAM RAMSAY** and wife, and others, Heirs of **DAVID PETER**, deceased.¹

Powers.—Equitable conversion.—Executors.—Discharge of debt.

David Peter, of the district of Columbia, by his will, declared it to be his intention, that all the proceeds of all his estate should be vested in his wife, for her support and for the maintenance and education of his children; that no appraisement or valuation should be had of any part of the property attached to his dwelling-house; that his children should receive good educations. He provided for the payment of his debts, by the following clause in his will: "I wish all my debts to be as speedily paid as possible, for which purpose, I desire that the tract of land on which Dulin lives, together with all personal property thereon, may be sold and applied to that purpose; and in aid of that, as soon as sales can be effected, so much of my city property as may be necessary to effect that object;" he appointed his wife, Johns, and George Peter, his executors. The whole of the personal property attached to the dwelling-house, went into the hands of Mrs. Peter; and she maintained her family and educated her children out of the proceeds of the estate. At the time of the decease of David Peter, he was largely indebted to the banks in the district of Columbia; and the executors, to obtain a continuance of the loans, and considering it advantageous to the estate to do so, gave their individual notes for the debts, and received the notes of their testator; this was done, under the understanding that the arrangement was to continue so long as the banks should be willing to indulge the estate; or until the executors could make sales of the estate for the payment of the debts. In the settlement of the accounts of the executors, in the orphans' court, the notes of the testator, received from the banks, were charged by the executors. The Dulin farm was sold, but no title made to the purchaser, he having paid a part of the purchase-money, and given his notes, indorsed, for the balance; his notes were not paid, and an ejectionment was brought for the recovery of the estate, which had not been decided. George Peter survived the other executors; and he was called upon by the banks to sell the real estate of David Peter directed to be sold to pay the debts. The children of David Peter obtained a perpetual injunction in the circuit court, to prevent the sale of the city property of their father, for the payment of the debts; alleging that no debts were due, as the notes of the executors had been received by the banks for the debts of the testator and they had charged them in their accounts with the estate: and also alleging negligence in not collecting the balance due for the sale of "the Dulin farm;" and that the executors were liable as for a *devastavit*, for the money which went into the hands of their mother, for the support of the family, and the education of the children; and it was denied, that the power to sell the estate of the testator survived to the surviving executor George Peter. The court held, that the direction of the will of David Peter to sell a portion of his real estate for payment of his debts, created a power coupled with an interest, that survived; that the surviving executor was, by necessary implication, the person authorized to execute that power and fulfil that trust; that the debt due the banks had not been extinguished, by the notes substituted by the executors, "as renewals in the bank, nor the estate of the testator in any way discharged from the payment of the debt; that the executors were not chargeable with negligence or misapplication of the personal estate, that ought to render them personally responsible for these debts; and that satisfaction of these debts should be had out of the lands appropriated by the testator for that purpose. The perpetual injunction granted by the circuit court was ordered to be dissolved.

If executors have paid a debt to banks, or the banks have accepted their note in payment, in place of the notes of the testator, so that the executors became the debtors, and personally responsible to the banks; the only effect of this is, that the executors became the creditors of the estate, instead of the banks, and may resort to the trust fund to satisfy the debt.²

¹ This case was reviewed and re-affirmed in *United States Bank v. Beverly*, 1 How. 134.

² Where land specifically devised was extended for a debt of the testator, and the husband of the devisee, who had become administrator *de bonis non*, paid the amount of the execution, he was held to be entitled to a credit therefor,

in the settlement of his account, to enable him to recover the same out of the residue of the estate appropriated to the payment of debts. *Wilkins's Estate*, 9 Watts 132. And where an administrator pays debts in full, upon entire confidence that the assets are sufficient for all purposes, but the estate subsequently proves to

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The testator had a right, unquestionably, so far as respected his children, to charge the payment, of his debts upon any part of his estate, real or personal, as he might think proper and most advantageous to his family; and if the creditors were willing to look to the fund so appropriated to that object, no one would have a right to counteract or control his will in that respect. And he having thought proper to constitute his widow the trustee of the proceeds of all his estate, for the maintenance and education of his children, thereby vesting in her an unlimited discretion in this respect, so far as the proceeds of his estate would go; the surviving executor is not accountable for anything applied by her for that purpose, not even if she would be chargeable with a *devastavit*.

It is a well-settled rule, that one executor is not responsible for the *devastavit* of his co-executor any further than he is shown to have been knowing and assenting, at the time to such *devastavit* or misapplication of the assets; merely permitting his co-executor to possess the assets, without going further, and concurring in the application of them, does not render him answerable for the receipts of his co-executor. Each executor is liable only for his own acts, and what he receives and applies, unless he join in the direction and misapplication of the assets.¹

It is a well-settled rule in chancery, in the construction of wills, as well as other instruments, that when land is directed to be sold and turned into money, or money is directed to be employed in the purchase of lands; courts of equity, in dealing with the subject, will consider it that species of property into which it is directed to be converted.²

The general principle of the common law, as laid down by Lord Coke, and sanctioned by many judicial decisions, is, that when a power given to several persons, is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive; but where the power is coupled with an interest, it may be executed by the survivor. It is not a power coupled with an interest in executors, because they may derive a personal benefit from the devise; for a trust will survive, though no way beneficial to the trustee; it is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question; and when an executor, guardian or other trustee, is invested with the rents and profits of land, for sale, or the use of another, it is still an authority coupled with an interest, and survives.

The courts of America have generally applied to the construction of such powers, the great and leading principle which applies to the construction of other parts of the will, to ascertain and carry into execution the intention of the testator. When the power is given to executors, to be executed in their official capacity of executors, and there are no words in the will warranting the conclusion, that the testator intended, for safety, or some other object, a joint execution of the power, as the "office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing the consequences that might result from an extinction of the power; and where there is a trust, charged upon the executors, in the direction given to them, in the disposition of the proceeds, it is the settled doctrine of courts of chancery, that the trust does not become extinct by the death of one

be insolvent, he will be subrogated to other claims against it, in favor of the same creditors. Weil's Estate, 1 Kulp 339. So, an executor who has made advances to legatees, out of his own funds, is entitled to be subrogated to their rights, to the extent of their *pro rata* share of the assets available for distribution, at the time of the accounting. Tichel v. Quinn, 1 Den. 425. So also, where a guardian advances to his ward, a sum of money secured to him by recognisance, the guardian is entitled to subrogation to the security. Kelchner v. Forney, 29 Penn. St. 47. But an administrator who has paid a claim against the estate, is not entitled to subrogation, without settling an account. Blank's Appeal, 3 Grant 192.

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¹ But though each executor is responsible only for the assets he receives, he cannot discharge himself, by simply paying over what he has received, to his co-executor. Edmonds v. Crenshaw, 14 Pet. 166. It has been held, that an executor who has received money belonging to the estate, and paid it over to his co-executor, who became insolvent, is not answerable to legatees, though he would be to creditors. Brown's Appeal, 1 Dall. 311. See note to that case.

² Seymour v. Freer, 8 Wall. 202; Craig v. Leslie, 3 Wheat. 563; Rinehart v. Harrison, Bald. 177; Reading v. Blackwell, Id. 166; Black v. Scott, 2 Brock. 326; Cropley v. Cooper, 19 Wall. 174.

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of the trustees ; it will be continued in the survivors, and not be permitted, in any event, to fail for the want of a trustee.¹

It is a settled doctrine, that the acceptance of a negotiable note for an antecedent debt, will not extinguish the debt ; unless it is expressly agreed, that it is received as payment.²

The auditor to whom the accounts of the executors were referred, made an estimate of the expenses of the family of Mrs. Peter for twelve years, without having called for vouchers for all the items of the expenditures. The court held, an allowance of \$6000 for the expenses of the family for twelve years, must certainly be a very moderate charge ; it was a proper subject of inquiry for the auditor, and there is no ground upon which this court can say, the allowance is exceptionable ; from the nature of the expenditure for the daily expenses of the family, it could hardly be expected, that a regular account would be kept ; and especially, under the large discretion given by the testator in his will, in relation to the maintenance of his family.

The amounts paid by the executors for the curtails and discounts on the notes running in the banks, were properly allowed to their credit ; these were debts due from the estate, and whatever payments were made, were for and on account of the estate.

APPEAL from the Circuit Court of the District of Columbia, and county of Washington. The appellees filed their bill in the court below, to enjoin a sale of certain real estate, being lots in Washington, which had belonged to David Peter, deceased ; which sale was about to be made by George Peter, his surviving executor, for the payment of debts due from his estate to the other appellants. The following is a copy of his will :

"In the name of God ! Amen. I, David Peter, of Georgetown and district of Columbia, do hereby make and establish this my last will and testament, revoking all heretofore made by me. 1. It is my intention, that the proceeds of all my estate shall be vested in my dear wife, Sarah Peter, for the maintenance and education of my children. 2. I wish all my debts to be as speedily paid as possible, for which purpose I desire that the tract of land on which Dulin lives, together with all personal property thereon, may be sold and applied to that purpose ; and in aid of that, as soon as sales can be effected, so much of my city property as may be necessary to effect that object. *3. I desire that the corner lot on Bridge and Congress streets shall be given to my son William, and the corner lot on Water and High streets to my son Hamilton, and the storehouse and lot adjoining the last-named corner, devised to my son Hamilton, to my youngest son James. 4. I desire that no appraisement or valuation shall be had of any part of the property attached to my dwelling-house. 5. I desire that my sons shall receive as good educations as the country will afford, and my daughters the best the place can furnish ; and I desire that in the general distribution of the residue of my estate, on the division between my sons and daughters, my sons may receive in the proportion of five as to three. I constitute and appoint my dear wife, Sarah Peter, Captain George Peter, Leonard H. Johns, my executrix and executors of this my last will and testament. In witness whereof, I have hereunto set my hand and seal, this 30th day of November 1812.

DAVID PETER. [L. s.]"

The will was executed in the presence of three witnesses.

¹ An imperative direction to executors to sell lands, and dispose of the proceeds in a certain way, is a power coupled with a trust, which survives Taylor v. Benham, 5 How. 233. And see Wells v. Sloyer, 1 Clark (Pa.) 516; Cobb v. Biddle, 14 Penn. St. 444; Lor-

ings v. Marsh, 6 Wall. 354.

² United States Bank v. Daniel, 12 Pet. 33 ; United States Bank v. Beverly, 1 How. 134 ; Lyman v. United States Bank, 12 Id. 225 ; Downey v. Hicks, 14 Id. 249 ; The Kimball, 3 Wall. 87.

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They charged in their bill, that George Peter was about to sell certain real estate of the testator, whose heirs and devisees they were, for the payment of debts alleged to be due to the Bank of Columbia and to the Bank of the United States, the said debts having been assigned to him ; that a very large real and personal estate came to the hands of the executors of said David Peter ; and that if they had used due and reasonable diligence in respect to the trust confided in them by the said will, and had properly applied the assets arising from the sales of the real and personal estate of said David, in a lawful course of administration, all the debts of the said David would have been fully paid, without any further application to the real estate to raise money for that purpose. They charged them with having received moneys which they had not accounted for ; that they sold the land in Maryland, mentioned in the will, and received about one-half the purchase-money, and that the whole ought to have been received, if the executors had used due diligence. They stated, that the executors had settled accounts in the orphans' court, which they had exhibited, whereby it appeared, that they had overpaid the personal estate more than \$12,000 ; and they contended, that if "by the neglect of the *executors, they have not received and applied the whole *536] of the purchase-money of the land sold, to indemnify and reimburse them for the advances made towards the payment of the debts, they, the complainants, ought not to be affected by such negligence." They denied, "that there is any debts due to the banks, or any other debt whatsoever, for the payment of which it is necessary, proper or lawful for the said George Peter to make sale of the said city lots." They prayed for injunction and general relief.

The answer of George Peter stated, that he was the brother of the testator, and that of the other executors appointed by his will, one was his widow, and the other, Leonard H. Johns, her brother ; that at the death of the testator, in 1812, he resided in Georgetown, and in 1816, removed to the country, in Maryland, where he had ever since resided ; that although he consented to qualify as executor, he did not deem it necessary that he should interfere in the management or settlement of the estate with the widow and her brother ; and that, except in attending to a farm and the stock thereon, and a few inconsiderable tenements in Montgomery county, Maryland, which were near his own property, he did not so interfere ; that believing Mr. Johns to be fully competent, and that he would attend to the business in the way best calculated to promote the interest of his sister and her children, he left it to them to settle the estate, and collect and dispose of the proceeds thereof, and provide for the support and education of the family as they might think best. That all this was well known to the complainant Beverly, who married the oldest daughter of the testator, in 1819, and who, and his wife, lived with her mother, till within a year or two of her death ; and he exhibited a letter of said Beverly to prove this.

He stated, that he had nothing to do with the settlement of accounts in the orphans' court, "further than that it was explained to him to be necessary in order to comply with the rules of the banks, and thus to continue the debts, and save the property from sacrifice by a sale, to put in, by way of renewal, the notes of the executors for those of the testator ; and that the accounts should be settled in the orphans' court, so as to show those debts in the banks, thus paid by the executors ; they having substituted their own

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notes ; and that this arrangement should continue as long as the banks would be willing to indulge the estate, or until the executors should be able to make sales for the payment of said debts ; and he averred, that this arrangement was explained and understood, and assented to by the said *executors and the said banks, and he presumed was explained to the orphans' court.^[*537] That this arrangement was well understood by Beverly, the widow, and all the children who were old enough to understand anything of their affairs ; was often talked of by the complainant, Beverly, and Ramsay, who always spoke of the estate as liable to the banks ; and he exhibited numerous letters from Beverly, showing his knowledge of, and acquiescence in it ; and showed that said Beverly was, for a considerable time, acting as agent for the estate, under the authority of the executors, and paying discounts on these substituted notes to the banks, out of the rents of the estate, and sometimes from partial sales of lots, and at other times attempting to make sales for the purpose of paying interest to the said banks. He admitted the sale of the land, called Dulin's, in the will, to George Magruder ; that he paid part of the money, was sued and became insolvent ; and that an ejectment was brought to recover the land, that it might be re-sold ; that the ejectment was removed to the court of appeals of Maryland, where he believed it was still pending ; that if there was any neglect or delay in recovering this land, it was the neglect of the complainant, Beverly, who undertook to attend to it, being then agent for the estate, who also employed counsel to file a bill in chancery in Maryland, for a re-sale of the land.

The defendant, under these circumstances, considering this business in the hands and under the care of complainant, did not suppose it necessary for him to interfere in it. He admitted, that he received some small sums of money from the farm in Maryland, which he always sent to Mrs. Peter or Mr. Johns ; and which, with the other moneys they received, he believed were faithfully applied in paying the debts, and supporting and educating the children. He knew that great expenses were incurred in this way ; that the family continued to be supported in the way they had been accustomed to live ; and that the income of the estate, which had greatly diminished, must have been insufficient for these purposes ; that rents had greatly fallen, and most of the city property was unproductive, and the taxes were considerable. Under these circumstances, the executors exercised their discretion, honestly and fairly, in withholding the city property from forced sales at very low prices ; and became responsible to the banks, who consented to the arrangement made, to save the estate from sacrifice. He averred that considerable advances were made by the executors, particularly by *himself and Johns, for the payment of debts, and the necessary support and education of the family.^[*538] He exhibited statements with his answer, showing what, upon the lowest estimates, must have been the annual expenses for maintaining the family and educating the children ; and what was the annual income of the estate, showing its great inadequacy to meet those objects.

He contended, that under the arrangement with the banks, with the perfect understanding of the complainant, the estate remained liable to the banks ; but that if this were not so, yet if the executors had made themselves liable, they would have an undoubted right to resort to the estate for

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their indemnity or reimbursement ; and might use and apply this right, for the benefit of the banks, to whom the said debts are still due.

The answer of the banks referred to the answer of the surviving executor, for the facts stated as to the arrangement between the executors and the bank ; which they averred, was entered into, to save the estate of testator from sacrifice, and to continue the accommodation ; and that the executors and the bank, and the agents of the executors, one of whom was the complainant, Beverly, always so understood it, and looked to the trust estate as still liable to the banks. They exhibited statements showing the situation of these debts at the death of the testator ; and the various renewals by the executors afterwards, with the payments made by them and their agents, and the balance now due.

An amended bill was filed, calling for an account of another sum of money alleged to have been received by the executors, or some of them; and charging, more particularly, negligence in the executors, in not suing the indorsers on the notes of George Magruder, the purchaser of Dulin's farm, in time, and the consequent loss of the balance of the purchase-money, by such neglect.

To this amended bill, the surviving executor answered, stating his knowledge and belief as to the further sum charged to have been received and unaccounted for by the executors ; and he denied, as before, the negligence imputed to the executors ; and averred, if there was any negligence, it was that of Beverly, the complainant ; who, being interested in the estate, and being a lawyer, undertook to attend to the recovery of the balance of the purchase-money ; that the indorsers were in very doubtful circumstances ; that the land was looked upon by all interested as a sufficient security for *539] the *balance of the purchase-money, and that the counsel employed in recovering the balance of the purchase-money advised a resort to a resale of the land, as the best remedy to recover said balance ; that for this purpose, an ejectment was brought, and a bill in chancery filed in Maryland, under the direction and superintendence of said Beverly ; and that if any delay or negligence occurred in the prosecution of these suits, it was caused by said Beverly.

On the coming in of this answer, the cause was referred to an auditor, to make a report and account, and take depositions, &c. The following report was made by the auditor :

" This cause having been referred to the auditor, with directions to take and report an account of all sums received by the executors from the real and personal estate of David Peter, deceased, and of the sums paid by them, &c., and to take depositions and report all evidence and testimony by him taken—the auditor, after having notified the parties, proceeded to examine the accounts and vouchers of the executors, and the several statements made by the counsel of the complainants and defendants ; and now begs leave of this honorable court to report : That he has examined the several statements made by the executors with the orphans' court, and has extracted therefrom the several sums received and paid by them. In making the statement now submitted, the auditor has omitted the charges made by the executors, and for which they obtained credit in their settlement with that court for payments stated to have been by them made to the Bank of

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Columbia, and the Union Bank of Georgia, because it does not appear that these debts were, at that time, paid by them.

"When David Peter died, he was largely indebted to these banks upon indorsed notes, discounted in them. A proposition was made by the executors, and acceded to by the banks, to prevent these notes from lying under protest, to substitute notes to be drawn by Mrs. Sarah Peter, executrix, and indorsed by Leonard H. Johns and George Peter, executors. These notes of David Peter were retired by this substitution, and passed as credits to the executors, in the orphans' court, as paid, when in truth and in fact they were not paid. Whether the bank, by this arrangement, released the estate of David Peter or not, the auditor does not undertake to determine. In the account with the orphans' court, the executors are charged with the amount of the inventory of the personal estate, both in the district of Columbia and in Maryland; in the present statement these charges are *omitted. [**540 So far as any proceeds of the personal estate came into their hands, they are charged in this audit; but they are not charged with what the widow and heirs retained in their own hands, and for their own use; the object being to ascertain whether the executors are indebted to the estate, or the estate to them. It will be seen, that by an account stated by the counsel for the heirs, and annexed to the auditor's statement, that he has charged the executors with \$20,250, being the amount of sale of land to George Magruder. It appears from the papers, that the first payment for this land, amounting to \$6895.96, and interest thereafter, in all \$8000, is all that has ever been paid or received by the executors on that account; the balance has not been paid, under the plea by the representative of Magruder, that the will of David Peter did not sufficiently authorize the executors to sell and make a good title to the land. Under these circumstances, this charge for the balance of the purchase-money is rejected by the auditor.

"The counsel for the bank and executors has also made a statement, which is also annexed. The auditor rejects both statements, and presents one of his own. It appears, that when David Peter died, he possessed a large estate, with a suitable establishment, in Georgetown; he left a widow, three sons and two daughters, minors. His estate, although large, was not proportionably productive; it consisted of land in Montgomery county, Maryland, and lots and houses in Georgetown and the city of Washington; most of the lots were unimproved. The land in Maryland was tenanted out, except one farm, which, being stocked, was reserved for the management and support of the family, and so remains to this day. The income arising from the estate annually, after paying taxes, was insufficient to defray the expense of the establishment in Georgetown, in the manner they had been accustomed to live, and to educate the three sons and two daughters. The auditor has, therefore, estimated the family expenses at \$1500 per annum, or \$500 over and above the produce of the stocked farm, and the small amount of rents received in Montgomery. In addition to these expenses, the estate was bound, by the will of David Peter's father, to contribute to his mother's support during her life, \$500 in money, with a proportion of wood and provisions, per annum. These heavy charges upon the estate, and the accumulation of interest and discounts on debts, has caused the estate to fall largely indebted to the *executors, while the Bank of the United States, as assignee of the Bank of Columbia, and other claim- [**541

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ants, remain unpaid. The claims upon the estate by Richard West, Thomas P. Wilson and the Union Bank, were recovered by judgments against George Peter, as executor and indorser, and have been fully paid by him.

"By the statement now presented, it appears, that the estate is indebted to the executors \$17,539.61, arising from the above causes; the larger part, if not the whole, is, in justice, due to George Peter; in addition to which, he has an account for a considerable amount, which is suspended in this audit, on account of some charges in bank, for sundry payments to managers and overseers, blacksmiths' bills, &c; which charges may be considered when the claims generally shall be presented for final settlement.

"The death of the executrix, the subsequent death of Leonard H. Johns, who was the acting executor, and the surviving executor not residing in the district, and knowing little about the manner in which the estate has been managed, the want of papers, and confused state of the whole concern, render it a laborious and difficult task to do exact justice to all parties; but with the materials within his reach, the auditor has made the best report in his power, which he hopes will be received. It cannot be very material to the heirs, whether they still owe the bank or not; because if they do not owe the bank, they will be by the same amount more indebted to the executors. December 10, 1833."

The complainants excepted to the report of the auditor. The following is a summary statement of the exceptions:

1 and 2. That the auditor has not charged the said surviving executor with the amount of the inventories of the personal estate of the testator, filed by the said executors in the orphans' court of Washington county district of Columbia, on the 12th of December, in the year 1812, and on the 12th of January 1813.

3. That the auditor has not re-charged the surviving executors with the sum of \$4552, being the value of certain personal effects, parts of the assets of the testator's estate, applicable to the payment of his debts, which was improperly delivered to Sarah Peter, widow and executrix of the said David, as a legacy, and for which said executors have obtained, improperly, a credit, on the settlement of their accounts with the said orphans' court.

4 and 5. That the auditor has not charged the said surviving executor [542] with the amounts, respectively, of two promissory notes of *George Magruder, and interest on one to the 1st of January 1815, and the other to the 1st of January 1816, which said notes were received by the said executors of said Magruder, for the second and third instalments of the purchase-money of the tract of land called Dulin's farm, devised to be sold, and sold by said executors, to aid in the payment of testator's debts, which said sums of money were lost by the gross neglect and fault of the said executors.

7. That the auditor has given credit to said executor, in said account-current, for the sum of \$5809.92, being the estimated amount of taxes on the real estate devised by said David Peter to the complainants (the appellees), and supposed to have accrued prior to the year 1829, without any evidence that the said executors had ever paid that or any other sum of money on account of such taxes.

8. That the auditor has given credit to the executors for the sum of

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\$6000, being, as he says, the estimated amount of the expenses of Mrs. Sarah Peter's family for twelve years, without evidence to show that that, or any other sum of money, was expended by the said executors for such purpose.

9, 10 and 11. That the auditor has given credit to the said executor, for the sum of \$8931.12, for discounts and curtails paid in the Union Bank of Georgetown, and \$1430.75, for discounts and curtails paid in the Bank of Columbia, since the 25th of September 1815; after which time, no debt was due from the estate of David Peter to either of the said banks, and after the said executors were in possession of assets of the said estate, sufficient to pay all the debts of the said David.

12. That the auditor has rejected the statement and account presented on the part of the complainants, the appellees, and refused to charge the said executors as they are therein charged.

In January 1835, the circuit court overruled the exceptions, and on the 25th of May 1835, the following decree was made. "This cause having been set for hearing upon the bill, answers, exhibits and evidence, and having been argued by counsel, it is, this 25th day of May 1835, upon further hearing of the parties and their counsel, ordered, adjudged and decreed, that the auditor's report, heretofore excepted to by the complainants, be and the same is hereby confirmed, and the exceptions thereto overruled. And the court, further considering the said cause, do order, adjudge and decree, that the said injunction, granted as aforesaid, on *the prayer of said complainants, be and the same is hereby made perpetual, and that the defendants pay to the complainants their costs of suit." From this decree, the defendants appealed to this court; and the complainants appealed from so much of the decree as confirmed the auditor's report.

The case was argued by *Key* and *Sergeant*, for the appellants, George Peter, executor, and others; and by *Coxe* and *Marbury*, for James B. Beverly and others.

The counsel for the the appellants submitted the following points to the court. 1. That under the arrangement made between the banks and the executors, the trust estate in their hands continued still liable to the bank for the testator's debt, notwithstanding the substitution of the executor's notes. 2. That if not, still the trust estate was liable for the indemnity and reimbursement of the executors, who had assumed the responsibility of these debts. 3. And if so, the proof shows that they had largely overpaid the estate, even beyond the amount of the responsibility thus incurred; the allowance made by the auditor, for the support and education of the family, excepted to by the complainant, being correct, and his disallowance of the charge on the executors for negligence, for the unpaid balance of the purchase-money, for Dulin's farm, also excepted to, being also correct. 4. That under the will the power to sell survives to the remaining executor. 5. That the decree of the court below is repugnant, erroneous and contrary to equity, inasmuch as confirming the auditor's report, and thereby admitting the equity of the defendants, to the extent before stated; it nevertheless grants a perpetual injunction against the appropriate legal mode of effectuating that equity, without affording them any other relief.

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Key, for George Peters and others.—The facts of the case are these : The testator, D. Peter, died in 1812, leaving a widow and five children, all *544] young ; the eldest about twelve years old. They *continued to live in the mansion-house, in Georgetown, till 1825, when the widow died. The executors were the widow, her brother, Leonard Johns, and George Peter, the testator's brother, the surviving executor. The family were supported and educated ; and the income of the estate was insufficient for that purpose, as is averred in the answers and proved. The principal debts were due to the banks ; some discounts were paid, but a large amount of interest is still due on the debts. The executors made an arrangement with the banks, by which their own notes were substituted for the testator's, and were to be so continued as long as the bank would indulge, or until the executors could make sales. This arrangement was understood by Beverly and Ramsay and all the family, as is proved by the answers, by Beverly's letters and by Kurtz.

In 1827, the banks file a bill against the heirs, to sell the real estate to pay these debts. Beverly and other heirs answer, that the debts are paid by the executors' notes, and plead limitations. In the meantime, the surviving executor, having judgment against him by one of the banks, levied, or about to be, on his own property, is advised that he has a right to sell the city lots, as surviving executor, and advertises a sale in 1828. The bill is then filed by Beverly and the heirs, and injunction obtained, which the court below has decreed shall be perpetual.

In 1814, the executors sold Dulin's farm to Magruder, and received about one-third of the purchase-money. The will shows that the testator intended the property specifically devised for that purpose, should be applied to pay his debts ; that the other property, the personal estate, should be kept for his family ; that in his house not to be inventoried ; and that the children should be maintained and educated. The city lots to be sold, in aid of Dulin's farm, to pay his debts, as soon as sales could be effected. These intentions the executors have fulfilled ; and it is not creditors, who had a right to do so, that are complaining of this, and that their debts have not been paid out of the personality ; but the heirs, who have received all the benefit of the estate, as intended by the testator, who have had all the personal estate, and who now seek to throw the debts on the executors, and take from them, for their own use, the trust property, which they were to sell to pay the debts.

*545] *Their bill charges misapplication and negligence. What is the misapplication ? Not that they have applied the estate to their own use, or to the use of any one but the heirs ; but that they have not "duly administered" the estate, by applying the personal estate to pay the debts. Nor is the misapplication charged on the surviving executor ; it may have been that of the widow and her brother. The same as to the negligence : and the answer, and Beverly's own letter, and his bill, filed in 1821, and dismissed, show that the defendant, George Peter, came to the trust merely to attend to a farm or two in Maryland ; and that he left the whole management and settlement of the estate, and the maintaining and educating the children, to the widow and her brother, the other executors. If they misapplied the assets to the children's use, instead of the creditors, it would be bad enough for the children to complain of this against them.

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But to complain of this, or of their negligence against the defendant, the surviving executor, who had nothing to do with it, would be still more unreasonable. The effort is to make him pay the testator's debts, because the other executors gave the property to the children; and it is made by the children, who have had all the benefit of the property. 7 Johns. Ch. 23.

I. Were the debts paid to the banks? Payment of one note by another, is never presumed an extinguishment; it must be proved to have been so received. All the answers and evidence, and Beverly's letters to 1827, and his bill filed against the executors in 1821, and dismissed in 1824, show it was not so received; that the trust property still continued liable for the debts. The notes of the testator were given up, not to be cancelled, but in confidence to be preserved; to be filed, with the executors' account, in the orphans' court; that account was not finally settled; the notes are there. 11 Johns. 513; 14 Ibid. 404, 414; 7 Har. & Johns. 92; 2 Gill & Johns. 493.

II. But if it was a payment, still the trust estate would be liable for the indemnity and reimbursement of the executors. The executors would be substituted for the creditors, and could sell. 7 Har. & Johns. 134; 4 Gill & Johns. 303; 2 Pick. 517; 1 Conn. 51.

III. And so, the proof shows that they had largely overpaid the estate, to an amount far beyond the amount of the bank debts. *The accounts taken by the auditor all show this; and the exceptions were properly overruled by the court below. As to the first, second and third exceptions, the auditor was right in not charging the executors with the inventories, and in allowing them what they gave the widow. He charges them with what they sold; all the rest, the family had. As to the fourth and fifth, the charge of negligence in not recovering the balance of the purchase-money from Magruder: the executors are proved to have acted by advice of counsel; to have brought an ejectment to recover the land and re-sell it. If there was any delay in that point, the fault was Beverly's, who undertook to superintend it. 2 Johns. Cas. 376; 4 Gill & Johns. 323; 1 Har. & Gill 88; 4 Gill & Johns. 453; 4 Rawle 148. As to the sixth, the tax lists show the amount paid; there was no other way of being paid but out of the estate by executors—this is proved also by Beverly's letters. As to the other exceptions, the auditor was right in allowing for the discounts paid on their notes, and in allowing \$600 a year for twelve years' maintenance of the family; the proof, and Beverly's letters, show this. He married in 1819, and lived with his wife, with the widow, her mother, till shortly before her death. *Wire v. Smith*, 4 Gill & Johns. 303; *Billington's Appeal*, 3 Rawle 48.

IV. As to the fourth point, the power of the surviving executor to sell: he cited, *Lock v. Luggin*, 1 And. 145; 3 Dyer 371; *Moore's Case*, 2 Leon.; Pow. on Dev. 239; Sugd. on Powers 157, and note; 6 Rand. 600; 2 Dall. 223; 3 Binn. 69; 1 Yeates 422; 3 Ibid. 163; 4 Hen. & Munf. 444; 5 Munf. 150; 4 Har. & McHen. 455; and contended, that this will created a trust, not a naked power, which survived, and to the executors *virtute officii*: cited, Sugd. on Powers 111, and note.

V. The court confirmed the auditor's report, admitting thereby that the estate was overpaid by the executors, and yet prohibit the sale; this is

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repugnant and erroneous. If the court thought the surviving executor had no power to sell, why enjoin him? Why not, as the parties were all before the court, appoint a trustee and decree a sale? This they could have done with a cross-bill. But if a cross-bill had been necessary, the court should have directed it. Coop. Eq. 7, pl. 34, 84; 7 Johns. Ch. 250-51; Mitf. 81.

*The counsel for Beverley, and the other appellees, insisted : 1. *547] That at the date of the advertisement of the sale of the lots, there was no debt due the banks, or either of them, or any other debt whatsoever, for the payment of which it was either necessary, proper or lawful for George Peter to sell the city lots. 2. That the balance of debt appearing, by the auditor's report, to be due from the heirs of David Peter to the executors, is made up of charges which, if they have any valid existence, have arisen since the death of David Peter, and are not embraced within the provisions contained in his will for the payment of his debts; and, consequently, that the real estate is not liable to be sold for the payment of the same. 3. That the surviving executor, George Peter, has no legal right or authority, as executor, to sell the land in the said will devised to be sold for the payment of the testator's debts. 4. That the city lots, advertised to be sold as aforesaid, are not, by the will, devised to be sold, until the proceeds of the sale of the farm on which Dulin lived, and the personal estate has been applied, and a deficiency appear. 5. And in order that the whole controversy between the parties may be closed without further appeal to this court; the appellees further insisted, that the circuit court erred in overruling the several exceptions aforesaid to the auditor's report, and in ratifying and affirming the said report.

Marbury, for the appellees:—The executors claim a right, under the will of David Peter, to sell the land devised, for the payment of his debts; they have been enjoined from so doing, until it shall be ascertained that there are debts existing, for the payment of which it would be right to make such sale; the debts alleged to be unpaid are those which were owing by the testator, at the time of his death, to the Bank of Columbia and the Union Bank of Georgetown. On the part of the appellees, it is insisted, that these debts have been paid, since the death of David Peter; not in fact with money, but by the substitution of the private notes of the executors, and the simultaneous surrender by the banks to the executors of the original notes of their testator, with the design that the executors might exhibit those notes as paid, and obtain a credit for the amount in the settlement of their account with the orphans' court. As a sufficient consideration for *548] their assumption to *pay these debts, the executors had in their control an estate amply sufficient for payment of all the debts of the testator, whenever they should please to apply it; their notes given in lieu of the testator's have been renewed by the banks from time to time for the term of fifteen years. The object of their arrangement had been accomplished; their account has been settled in the orphans' court; they have obtained a credit for the amount of David Peter's debts to the banks; his notes are there filed as vouchers, by which the executors are discharged from liability to account for an equal amount of the assets in their hands. Having thus dealt with the executors, the banks cannot now claim to be creditors of the estate of David Peter. If one deal with another's agent,

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and give him a receipt for a sum of money which the agent had a right to pay ; and on the faith of that receipt, the agent obtains a credit in settlement with his principal, the debt is thereby discharged. 15 Johns. 276. It is conceded, that the acceptance of a promissory note will not pay a debt, unless it be so agreed ; but the acceptance of such a note, and the simultaneous surrender of that in lieu of which it is given, are necessarily conclusive of the fact that it was given and received in payment. 16 Johns. 273 ; 12 Ibid. 409 ; 1 Dane's Abr. 126.

It is said, if the debts have been paid by the executors, they stand in the place of the creditors, and are entitled to sell for their own indemnity. It cannot be denied, that a trustee who advances his own money, before sale, to pay the debt of his principal, may make the trust fund available to himself for his indemnity. In this case, however, the executors had the control of an ample personal estate, including the proceeds of the land sold by them under the will, to pay the debts. If it has become a matter of account between executors and heirs, this personal estate must be first accounted for. What has become of it ? Why have the executors not applied it to discharge the debt ? They ought not to be allowed to appropriate other parts of the estate, before this has been accounted for. The land devised to be sold for the payment of debts is, in equity, regarded as personal estate. 1 Har. & Gill 96.

A full and satisfactory account has not been taken ; the auditor has refused to charge the executors with the amount of the inventory of the testator's estate, made out by themselves, and returned to the orphans' court ; and this, under the pretext that the property therein inventoried and appraised, never came to the possession of the *executors. This is at variance with the evidence in the cause, and the act of the [*549] executors, who, in their settlements in the orphans' court, have charged themselves with the same property. The act of 1798, ch. 101, requires executors and administrators to return inventories only of property which does come to their possession ; and such return is *prima facie* evidence against them. The inventory is the basis of the administration account : the act requires, in terms, that the executors shall be charged with the amount of it ; they must discharge themselves.

The auditor has also refused to charge the executors with the notes taken by them of the purchaser of Dulin's farm, sold under the authority in the will ; although it is made manifest, that the money secured by those notes, has been lost by their gross negligence. Near five years were suffered to elapse, after the notes had fallen due, before any step was taken to enforce the payment of the money ; a suit was then brought against the maker, but no suit was ever instituted against the sureties ; the remedy against them was voluntarily abandoned by the executors. They are chargeable with the amount of the notes, and interest to the period of their maturity ; from that day, the amount must be taken to be assets in hand for the payment of debts. 3 Johns. Ch. 552 ; 4 Ibid. 284 ; 1 Har. & Gill 88 ; 2 Bro. C. C. 156 ; 5 Ves. 839 ; 11 Wend. 361.

It has been said, the executors are not chargeable with the personal estate, because the testator has charged his real estate with the payment of his debts, and thereby exempted the personal estate, and given it to his family. The personal estate is the primary fund for the payment of debts,

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and must be first applied. In order to exempt it, the testator must express his intention to that effect; it is not sufficient merely to charge the real estate; he must show expressly his intention to be, that the personal estate shall not be applied in discharge of his debts. 1 Bro. C. C. 144; 1 Ch. Cas. 296. There is nothing in the will of the testator to support the construction of the opposite counsel. The real estate is charged only to aid in the speedy payment of the debts, but the personal estate is not exempted, either directly or indirectly.

The auditor has not only refused to debit the executors with the preceding charges, but he has allowed them credits which can be sustained neither by the evidence or law; in his account, the *executors are credited *550] by the sum of \$5809; being, as he says, the estimated amount of taxes on the real estate of David Peter, from his death in 1812 to 1829. That such taxes became due, and have been paid, is proved; but by whom, and out of what fund, paid, is not proved. It was not the duty of the executors, or even proper for them, to pay such charges, and more particularly, while debts were outstanding and unpaid; it is not, therefore, to be presumed, that this sum was paid from the personal estate, and by the executors.

They have also been credited by the sum of \$6000 alleged to have been expended by them in the maintenance of Mrs. Sarah Peter's family; and this has been done without any evidence that the executors ever expended one cent for any such purpose. This income of their estate is the proper fund for the education and maintenance of heirs, during their minority. The law indicates this; and guardians are not permitted to exceed it without necessity, and then only with the sanction of the judge of the orphans' court. Acts of Assembly, 1785, ch. 80, § 9; 1798, ch. 101, sub. ch. 12, § 10; 2 Har. & Gill 128. The testator, in his will, sets apart the income of his estate for this very purpose; the executors had no right to exceed it; if they have done so, they should show that necessity required it; that the orphans' court sanctioned it; and that they actually expended the money for the purpose; they show neither: this credit ought not to be allowed. 1 Har. & Johns. 227; 8 Mass. 131.

If the account be remodelled, and the principles contended for be admitted, it is apparent, that the executors, in 1816, were in possession of abundant means, at pleasure, to pay all their testator's debts; it was their duty to apply the assets to that purpose, and save the estate from the accumulation of interest. Whether they applied the money to their own use, or only neglected to apply it properly, is of no consequence; they are chargeable with the interest. If they have suffered the debts to stand unpaid, and have, themselves, subsequently paid them, with interest, they ought not to be allowed in their account for the interest so paid; it was created by their neglect, and they should bear the burden themselves: all discounts and interest paid after the year 1816, and credited by the auditor, ought to be disallowed.

The surviving executor is equally chargeable with the others; he joined in the return of the inventories; that fact shows him in possession of the property included in them; it was not only his *right, but his duty, to retain that possession and apply it to the purposes of the estate. Dick. 356; 1 Russ. & Mylne 64. He joined also in the sale of the land, and in the

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receipt for the cash paid, and notes given for the purchase-money; and although the money may have been paid to another, yet he is responsible. Prec. in Ch. 178.

Coxe followed on the same side.

Sergeant, in reply:—It is argued on the part of Beverly and others :

1. That there was no debt due to either of the banks, nor any other debt due by the estate of George Peter, for which it was proper, lawful and necessary to make a sale of the real estate. The inquiry then is, was there a debt due to the Bank of Columbia, and to the Bank of the United States. This is the first branch of the question. It is not denied or disputed, that at the time of the decease of David Peter, debts were due to both those banks. Have those debts been paid? For their payment, provision was made by the will; a trust, accompanied with a power to sell particular portions of the estate, was created by it. The proof of the payment of the debts lies on those who now seek to obtain the estate of the testator, and to restrain the executor from selling the same for their payment. Until payment, the debts remain a lien on the trust; and nothing can effect the lien, but a failure of the trust, or a failure of power to execute it.

Have the complainants in the circuit court proved that these debts have been paid? They do not pretend, that an actual payment has been made. It is well known to them, that the executors never had the means of payment; and this is manifest from the accounts which were exhibited to the auditor, and which are in the record. But, without even an allegation of actual payment of the debts, an attempt has been made to show a constructive payment; and while the surviving executor would, by the success of this effort, remain personally liable for the debts, and the whole of his private estate will be absorbed; the estate of his testator, David Peter, will be enjoyed by his devisees.

The discharge of the estate of the testator from the debts due at the time of his decease to the banks, is asserted and claimed, because *the notes given by him were surrendered to the executors, and their private notes given to the banks in lieu of them. “The acceptance of a negotiable note for an antecedent debt, will not extinguish such debt, unless it is expressly agreed that it is received as payment.” SPENCER, Justice, in *James v. Hackley*, 16 Johns. 278. It was expressly agreed, in this case, that the surrender of the notes should not be so considered; and the parties interested always acted in the spirit of the arrangement. It was known to Mr. Beverly, that the debts to the banks continued, and had not been paid. In his correspondence, he refers to the payment of a part of the funds of the estate to the discharge of the discounts, and to the peculiar liability of Mrs. Peter for some part of the debt, by notes given by her. This is also proved by evidence in the case; and in a bill filed by Mr. Beverly in 1821, the debts are stated to be unpaid. In support of the position that giving up a note is not an extinguishment of a debt: cited, *Arnold v. Camp*, 12 Johns. 409; 16 Ibid. 298; *Glen v. Smith*, 2 Gill & Johns. 493. The legal presumption is, that it is not an extinguishment of a pre-existing debt; but there are cases where the court will intend it to have been in satisfaction of such a debt. *Arnold v. Camp*, 12 Johns. 409; *Cheever v. Smith*, 15 Ibid. 276; *James v. Hackley*, 16 Ibid. 278. Has the principle any application to

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the case before the court? The contrary is asserted, and the record furnishes abundant evidence to support the assertion. Every one interested in the estate knew the real situation of the case. The whole of the resources were insufficient to support Mrs. Peter, as she was authorized to claim to be supported by the will; and the executors had no means to pay the debts. The family of the testator were maintained, and Mr. Beverly resided in the family mansion, after his marriage with one of the children. He was well acquainted with the affairs of the estate, and acted in reference to them.

The executors were always creditors of the estate. In 1814, the estate owed the executors \$9148.40. In 1821, the balance due them was \$24,131.10. The report of the auditor fully establishes the fact, that the estate was always indebted to them in a large amount. Upon his report, \$11,539.61 were due to them, exclusive of the bank debts. If these estimates are denied, it will still be admitted, that, in any form of stating the accounts, they were creditors.

*553] *It was perfectly consistent with the trust in the executors, to make the arrangements they did for the postponement of the bank debts; and they did it in good faith. The bank, to give time, required notes from the executors individually; and notes were accordingly given. But the agreement was also made, that the banks were to continue their claim on the trust. The equity is, therefore, against the extinguishment asserted. There are collateral proofs that this was the arrangement. The discounts paid are charged to the estate, and the cost of a protest is charged. Beverly always admitted the charge for discounts on the notes, after the original notes had been given up. The first objection ever brought forward, was presented on filing the exceptions to the master's report. It is, in fact, the ordinary case of putting vouchers in the hands of the trustee, under a special agreement. Cited, 2 Gill & Johns. 510.

2. But suppose, the facts were that the estate of David Peter was no longer indebted to the banks; that by the surrender of his notes, and taking the private notes of the executors, they were no longer creditors of the estate; would the debt be thereby extinguished? It would only be transferred; and would be and remain, until paid by the estate, due to the executors. In equity, they would be the creditors of the estate; and would be entitled to the benefit of the security in the will. The surviving executor would still be a trustee; and have all the rights over the estate to provide, by its sale, for the satisfaction of the debts which were originally given by the will. To the authorities cited, may be added *Greiners' Case*, 2 Watts 414. The executor agrees that the original creditor shall still have the security. This he has a right to do; and no one can interpose to prevent his carrying this purpose into effect. There is a plain equity in favor of this.

But there is a further equity in this case, supporting all that has been urged for the consideration of the court. It answers also the second point made by the appellees. That point is, that if any balance is due to George Peter, as stated in the auditor's report, it is made up of charges arising since the date of the will, not embraced in the provisions thereof for the payment of the same; and therefore, that the real estate of the testator is not liable to be sold for the payment of that debt. The facts stated *554] in this proposition are not sustained. There *never was in the hands

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of the executors, or under their control, the means of paying the debts. After making the provision for Mrs. Peter, the whole, and more than the available means of the estate, were consumed. The debts due the executors grew out of advances made for the estate, for taxes, expenses and interest.

Who are the parties before the court? The executor, and the only remaining creditors on one side; and the children of the testator, his legatees, on the other. It is the duty of the executor to execute the will; and, independently of the creditors, he had no other law to regulate his action, and no other powers but those given by the will. Creditors may defeat the purpose of the testator, and control the action of the executors; but in this case, they submit to it, and ask the executor to perform his trust.

What then is the will, which the executors were to execute? What are its provisions? 1. As to a portion of the personal property, which was not to be appraised or valued. This amounted to \$4552; and was part of the personal estate in the dwelling-house at Georgetown; and was given to Mrs. Peter. 2. Certain specified portions of real estate, and personal estate on part of it, are set apart for the payment of debts. 3. All the rest of the estate is given for the maintenance of the family of the testator, and for the maintenance of the children.

Such a will may be wise, or it may be unwise, but it is a good will and lawful; and it is the duty of an executor to execute it, if he can. The power to do so depends on the creditors; and they have agreed; they take the trust and ask its performance. Can the legatees object to this? If they do, they object, not to the proceedings of the executor, but to the directions of the testator; the testator marshalled the assets. The will has been executed in the spirit, and according to the directions of the testator. The will made the real estate personal estate.

If it shall be said, that the estate has not been administered according to law; it is answered, that they have administered it as the law would have required of them, if there had been no will; but they have conformed to the will, in the administration; and this the creditors, now before the court, have permitted them to do. The family have every part of the estate but that which is now claimed by the creditor, and by the executor, to pay the debts; and now they want this, because they have had the rest. They would leave the creditors unpaid, and would deprive the executor of all his property; obliging the creditors of their parent to [**555 take his estate for the satisfaction of debts, which, by the will of their parent, were to be paid out of his estate. Against the claim of the surviving executor, a claim founded on his assumption of the debt of their father, the appellees, his legatees, would now plead the statute of limitations! The creditors now ask to have the fund provided by the testator, applied to the payment of their debts; this is resisted by the children of the testator. The equity of the claim is too plain to admit of a doubt.

It is altogether unnecessary here to inquire what would be the effect of the executors having misappropriated the other funds of the estate. They have not done so. The evidence, the true purpose and intent of the will, and the report of the auditor, clearly prove this. But if they had done so, on whom ought the loss to fall? It ought not to fall on the creditors, or upon their fund. Their forbearance should not be visited by such a penalty. There

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is no construction of the will which will sustain such a suggestion. The purpose of the will was to designate and set apart a portion of the estate for the payment of the debts of the testator. The will gives the executors a power to sell those portions of the estate to satisfy the debts. It creates a trust (Sugden 392-3); and equity will not permit the trust to fail for want of a trustee. In this case, it survives to the present executor, the appellant. Not being a naked power, but one created for a special and expressed purpose, being a trust, it will not be permitted to fail. Cited, Wilmot 23; Williams on Executors, 626-7. The construction of the will which is asserted for the appellant is strongly supported by the judgment of the court of appeals of Maryland. 4 Gill & Johns, 328-9.

Upon the exceptions to the auditor's report, Mr. Sergeant argued: as to the first and second exceptions, the property in the inventories was not sold, nor converted to the use of the creditors. It remained with Mrs. Peter and her family, and remains still with them. Are the amounts of the inventories of that property to be charged to the executors, who never received any of the property; or to the creditors, by whose forbearance the family of the testator was permitted to enjoy it? These observations also apply to part of the matter in the fourth and fifth exceptions.

*It is denied, that, on the part of George Peter, the appellant, *556] there was ever a neglect of duty. It does not appear, that at any time, until the filing of the amended bill in this case, it was ever alleged or mentioned. It is now brought forward, after one of the executors is dead, and his papers have been destroyed, and after Mrs. Peter's death. It is now charged against the only surviving executor, and who did not at any time take any other part in the business of the estate, but collecting rents; and who never appropriated a dollar of the estate to his own use.

In reference to the charge of neglect in not collecting the balance of the debt from the Dulin farm, no imputation of this kind can be sustained. It might well be supposed, that the property sold was a security for that balance; and the purchaser had acquired no title. The necessity of suing out the notes is not admitted; for the executors might have thought their recovery doubtful; or have thought a suit unnecessary. But as to this, there is a clear protection from personal liability by the executors, as they put the claim into the hands of counsel: and Mr. Beverly was well acquainted with the whole proceeding.

As to the seventh exception, the auditor, in giving the credit complained of in it, was perfectly right. Vouchers, sufficient, under the circumstances of the case, and considering the nature of the expenditures, were furnished to support the credit. Of the eighth exception, it may also be said, that the vouchers were such as ought to have satisfied, and did satisfy, the auditor. It could only be by an estimate of the family expenses of Mrs. Peter, that the auditor could arrive at any particular sum. For such expenses, receipts are not kept. The decision of the auditor on the amount is sufficient to sustain it.

The exceptions which go to the rejection of the debts for bank curtailments, and the payment of the discounts on the notes, cannot prevail; either if the debt was set down by the estate to the banks, or to the executors. There were no means of making these payments, in the hands of the execu-

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tors, derived from the estate ; and the funds must, therefore, have been provided out of their private means.

Mr. Sergeant went into a particular statement of the accounts of the executors, for the purpose of answering the twelfth exception : and contended, that the auditor was right in rejecting the statement and account presented by the appellees ; and refusing to charge the executors as charged by them. *He contended, that no fair account could be made, which would not show a balance in favor of the executors to a very large [*557 amount. To prevent this balance, there are but two ways of stating the account. One, to apply certain inapplicable rules to the conduct of the executors, which, when they ought to apply, are very well ; the other, to invoke and apply the statute of limitations. One mode makes the executor pay what the legatees have had, what the family has subsisted upon ; the other, deprives the creditors of what they ought to have had.

It is said, they had no right to apply the personal estate to the support of the family of Mrs. Peter, and to the education of the children. That this was not a lawful course of administration. This position is true, to a great extent, where there is no will ; but even in such a case, the rule is not universal. Some allowance is always to be made, and is always made. So, it may be true, when the will does not contain a proviso to the contrary.

A mere charge of the real estate with debts, does not, it is said, discharge the personal estate ; and the counsel for the appellees have cited cases to show this. Be it so ; for in the case before the court it is of no moment. It is sufficient, if there be an intention of the testator, declared in the will, that the personal estate shall be applied for the benefit or for the use of his family. If this has been done, the family cannot complain. 2 Conn. 681. We have in this case the plain and evident purpose of the testator, declared in his will ; and no more is required.

As to the attempt to set up the statute of limitations. This course is of doubtful morality ; and in the record, there is sufficient to show that Mr. Beverly cannot set it up. He was himself the cause of the delay, and many of the acts of the executors were directed by him ; and he had in charge a portion of the estate, during a part of the time since the decease of the testator. In 1827, by a bill filed by him, he acknowledges the existence of the debts, and he says nothing of the statute. But it is unnecessary to dwell on these matters, as the statute of limitations has no application to the case. The statute does not run in case of a trust ; this is such a case ; and if it was required for the protection of the claims of the appellants, there has been a continual acknowledgment up to this day. It has never been denied, that the statute does not run in case of a trust. 2 Ves. & B. 278.

But admitting this to be a trust in *England, it is denied to be so here. Has any authority been produced to sustain this denial ? and [*558 it would require the gravest authority to support it. But the direct contrary can be maintained by authorities. These will be found in Sugden 111, 165, in a note. But what is a trust ? It is, *quoad hoc*, distinct from a mere power, to be exercised or not. In this case, there was a fund set apart, and subjected to a power for payment of debts. Is it not then a trust in the executor, and a fund to which the creditor trusted ? The debt fastens to the fund, and continues till the trust is executed. As to the remark about

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the trustee connecting himself with the *cestui que trust* (Sugden 224), it means, that the trustee shall not buy any of the estate.

Is there any reason for enjoining the appellant not to sell? The decree is repugnant to itself. It establishes the title of the appellant to relief, and then denies all relief.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up on appeal from the circuit court of the district of Columbia for the county of Washington. The bill was filed by the appellees, in the court below, to enjoin the appellants from proceeding to sell certain lots of land in the city of Washington, belonging to the estate of David Peter, for the payment of debts alleged to be due to the Bank of Columbia, and the Bank of the United States. David Peter made his will, bearing date the 30th of November 1812, and shortly thereafter departed this life; and by his will he declares and directs as follows:

"It is my intention, that the proceeds of all my estate shall be vested in my dear wife, Sarah Peter, for the maintenance and education of my children. I wish all my debts to be as speedily paid as possible; for which purpose, I desire that the tract of land on which Dulin lives, together with all personal property thereon, may be sold and applied to that purpose; and in aid of that, as soon as sales can be effected, so much of my city property as may be necessary to effect that object. I desire that no appraisement or valuation shall be had of any part of the property attached to my dwelling-house. I desire that my sons shall receive as good educations as the country will afford, and my daughters, the best the place can furnish." And he [559] appointed his wife, Sarah Peter, his brother, George *Peter, and his brother-in-law, Leonard H. Johns, the executrix and executors of his will; of whom, George Peter is the only survivor. .

The bill charges that George Peter, the surviving executor, under color of the directions in the will, was about to sell that part of the real estate of David Peter which lies in the city of Washington, and has actually offered the same for sale at public auction. The bill further charges, that there came to the hands of the executors personal estate of the said David Peter to the amount of more than \$25,000. That they had sold the Dulin farm for \$20,688.90 to George Magruder, in the year 1813, and received one-third of the purchase-money, and took for the balance, divided in equal sums, two promissory notes, one payable the 1st of January 1815, and the other the 1st of January 1816; one indorsed by Patrick Magruder and the other by Lloyd Magruder. That the purchaser, George Magruder, was put into possession of the farm, and still holds it; and that the notes given for the balance of the purchase-money have been lost by the negligence of the executors. The complainants deny the existence of any debt, due from the estate of David Peter to the said banks, or either of them; or any other debt whatsoever, for the payment of which it is either necessary, proper or lawful for the said George Peter to sell the said city lots. And the bill prays that the executor may fully account for the real and personal estate of the said David Peter, and show how the same has been disposed of; and that the banks may be required to produce the notes, or other evidence of their pretended debt, and prove the same; and praying an injunction to restrain the said George Peter, and his agents, from selling or in any way

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disposing of, or incumbering, the real estate of the said David Peter, in the district of Columbia; concluding with a prayer for general relief. The injunction was granted; and, on the coming in of the answer, was ordered to be continued until the final hearing of the cause.

The answer of George Peter, the surviving executor, alleges that the principal management of the business of the estate was assumed by his co-executors; that believing Johns fully competent, and that he would attend to the business in a way best calculated to promote the interest of his sister and her children, he left it to them to settle the estate, and to collect and dispose of the proceeds thereof, and provide for the support and education of the children, as they might think best; and that all this was well known to the complainant, Beverly, who married the eldest daughter of the testator, in the year *1819. That he and his wife [^{*560} lived with her mother until within a year or two of her death. That the debts due to the banks had been continued by renewed notes, from time to time, made and indorsed by the executors, in compliance with the rules of the banks; and with the understanding that such arrangement was to continue as long as the banks were willing to indulge the estate, or until the executors should be able to make sales for the payment of those debts; that this arrangement was well understood by Beverly, and all the children who were old enough to understand anything of their affairs; and was often talked of by Beverly and Ramsay, who always spoke of the estate as liable to the banks for these debts. The surviving executor, to the charge of neglect, in relation to the balance of the purchase-money for the Dulin farm, alleges, that Magruder, the purchaser, was sued upon the notes given for the balance, and became insolvent. That an ejectionment was brought to recover possession of the land, that it might be resold, no title having been given for the land, but only a bond for a deed, according to the terms of the sale. That the ejectionment was removed to the court of appeals in Maryland, where he believes it is still pending. That if there was any neglect or delay in recovering this land, it was the fault of the complainant Beverly; who undertook to attend to it, being then agent for the estate.

The answer of the banks refers to the answer of the surviving executor for the facts stated, in relation to the arrangement between the executors and the banks; which it is averred was entered into to save the estate of the testator from a sacrifice, and to continue the accommodation. That the executors and the banks, and the agents of the banks, one of whom was the complainant, Beverly, always so understood it, and looked to the trust estate as still liable to the banks. They exhibit statements showing the situation of the debts at the death of the testator, and the various renewals by the executors afterwards, in their private capacity, with the various payments which had been made, and showing the balance now due.

An amended bill was afterwards filed, calling for an account of other moneys alleged to have been received by the executors; and charging more particularly negligence in the executors, in not having sued the indorsers of the notes of Magruder, for the balance of the purchase-money of the Dulin farm, and the loss thereof by reason of such neglect. To this amended bill the surviving executor answers, stating his ^{*knowledge} [^{*561} and belief respecting the moneys for which he is called upon to account, denies the negligence imputed to him, and avers, that if there was

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any negligence, it was that of the complainant, Beverly, who, being interested in the estate, and being a lawyer, undertook to attend to the recovery of the balance of the purchase-money. That the indorsers were in very doubtful circumstances ; that the land was considered, by all parties interested, as sufficient security for the balance of the purchase-money ; and that the counsel of the executors advised the resort to a resale of the land, as the best remedy for the recovery of such balance ; and for that purpose an ejectment was brought to recover the possession, and a bill in chancery filed in Maryland, under the direction and superintendence of Beverly ; and that if any negligence occurred in the prosecution of these suits, it was attributable to him.

The cause was referred to the auditor, to take and report an account of all sums of money received by the executors from the real and personal estate, respectively, and of the sums paid by them in the due course of administration ; and of any other sums paid by them for the maintenance of the family and the education of the children ; stating them separately. The auditor reports a large balance due the executors, allowing them for the maintenance of the family and the debts paid by them. To this report the complainants excepted, and the exceptions were overruled ; and at the March term of the circuit court, in 1835, a final decree was entered, confirming the report of the auditor, and decreeing a perpetual injunction. From this decree of a perpetual injunction, the defendants in the court below appealed ; and from so much of the decree as confirmed the report of the auditor, the complainants appealed ; and upon these cross-appeals, the cause comes here for review.

In examining the various questions which have been made in this case, the most natural order seems to be, to consider, in the first place, the will of David Peter ; upon this depends, in a great measure, the rights of the banks, as creditors of the estate, and the rights, duties and responsibilities of the executors ; and particularly, those which devolve upon George Peter the surviving executor.

David Peter died in the year 1813, shortly after making his will, leaving his widow, with a family of five children, two daughters and three sons, the eldest about thirteen years of age, living in ease and supposed affluence, as appears not only from the pleadings and proofs in the case, but as fairly *562] to be inferred from the provisions made for *them by his will, and the disposition made of his property. His primary object seemed to be, that his family should remain together, and live as they had been accustomed to live. And he, accordingly, in the first place, directs that the proceeds of all his estate should be vested in his wife, Sarah Peter (who is made one of his executors), for the maintenance and education of his children. He directs, that no appraisement or valuation should be had of any part of his property attached to his dwelling-house, and that his sons should receive as good educations as the country would afford, and his daughters the best the place could furnish. The family accordingly remained together, except Mrs. Beverly, and were maintained and educated according to the directions of the will, until the death of the said Sarah Peter, in the year 1825. The testator directed his debts to be paid as speedily as possible ; and for that purpose declared, that the tract of land on which Dulin lived, together with all the personal property thereon, should be sold, and applied

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to the payment of his debts ; and in aid of that, as soon as sales could be effected, so much of his property as should be necessary for the payment of his debts.

The testator had a right, unquestionably, so far as respected his children, to charge the payment of his debts upon any part of his estate, real or personal, as he might think proper, and most advantageous to his family. And if the creditors were willing to look to the fund so appropriated to that object, no one would have a right to counteract and control his will in that respect. And he having thought proper to constitute his widow the trustee of the proceeds of all his estate, for the maintenance and education of his children, thereby vesting in her an unlimited discretion in this respect, so far as the proceeds of his estate would go ; the surviving executor is not accountable for anything applied by her for that purpose, not even if she would be chargeable with a *devastavit*. For it is a well-settled rule, that one executor is not responsible for the *devastavit* of his co-executor, any further than he is shown to have been knowing and assenting, at the time to such *devastavit* or misapplication of the assets ; and merely permitting his co-executor to possess the assets, without going further, and concurring in the application of them, does not render him answerable for the receipts of his co-executor. Each executor is liable only for his own acts, and what he receives and applies, unless he joins in the direction and misapplication of the assets. Cro. Eliz. 348 ; 4 Ves. 596 ; 4 Johns. Ch. 23 ; 19 Johns. 427.

*It is not intended to intimate, that there was any *devastavit* or waste of the estate by Mrs. Peter. There is, indeed, no pretence in the bill, of any misapplication of the estate, by her or any other of the executors ; and for the very purpose for which the proceeds of the estate were vested in her, to maintain and educate a family of young children, it was necessary to clothe her with a large discretion ; and for this reason, the testator directs, that there should be no appraisement or valuation of any part of his property attached to his dwelling-house. The proceeds of all his estate being vested in his widow, would render it necessary, independent of any express direction in the will, that recourse should be had to the real estate for the payment of his debts.

And this leads, in the next place, to the inquiry, whether George Peter, the surviving executor, has authority to sell the lots in the city of Washington. With respect to the Dulin farm, no doubt can exist. The testator gives positive directions for that farm to be sold, and the proceeds applied to the payment of his debts. The executors, in the sale to Magruder, only gave a bond for a deed ; the title was not to be given, until the purchase-money was all paid ; and that not having yet been done, no title has been conveyed, and it yet remains subject to be applied to the payment of debts ; and a resale is necessary, in order fully to carry into effect the will of the testator. It is a well-settled rule in chancery, in the construction of wills, as well as other instruments, that when land is directed to be sold, and turned into money, or money is directed to be employed in the purchase of land, courts of equity, in dealing with the subject, will consider it that species of property into which it is directed to be converted. This is the doctrine of this court, in the case of *Craig v. Leslie*, 3 Wheat. 577 ; and is founded upon the principle, that courts of equity, regarding the substance,

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and not the mere form of contracts and other instruments, consider things directed or agreed to be done, as having been actually performed.

But this principle may not perhaps apply in its full force and extent to the city lots. They are not positively directed by the will to be converted into money; but the sale of them was contingent, and only in aid of the proceeds of the Dulin farm, if a sale of them should become necessary for the payment of debts. But independent of this principle, there is ample power in the surviving executor to sell. We find, in the cases decided in the English courts, and in the elementary treatises on this subject, no little confusion, and many nice distinctions. *The general principle of the common law, as laid down by Lord COKE (Co. Litt. 112 b), and sanctioned by many judicial decisions, is, that when the power given to several persons, is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive; but when the power is coupled with an interest, it may be executed by the survivor. 14 Johns. 553; 2 Johns. Ch. 19. But the difficulty arises in the application of the rule to particular cases. It may, perhaps, be considered as the better conclusion to be drawn from the English cases on this question, that a mere direction, in a will, to the executors, to sell land, without any words vesting in them an interest in the land, or creating a trust, will be only a naked power, which does not survive. In such case, there is no one who has a right to enforce an execution of the power. But when anything is directed to be done, in which third persons are interested, and who have a right to call on the executors to execute the power, such power survives. This becomes necessary for the purpose of effecting the object of the power. It is not a power coupled with an interest, in executors, because they may derive a personal benefit from the devise; for a trust will survive, though no way beneficial to the trustee. It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, guardian or other trustee is invested with the rents and profits of land, for the sale or use of another, it is still an authority coupled with an interest, and survives. 1 Caines Cas. 16; 2 P. Wms. 102.

In the American cases, there seems to be less confusion and nicety on this point; and the courts have generally applied to the construction of such powers, the great and leading principle which applies to the construction of other parts of the will—to ascertain and carry into execution the intention of the testator. When the power is given to executors, to be executed in their official capacity of executors, and there are no words in the will, warranting the conclusion, that the testator intended, for safety or some other object, a joint execution of the power; as the office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing, the consequences that might result from an extinction of the power; and where there is a trust, charged upon the executors, in the *direction given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery, that the trust does not become extinct by the death of one of the trustees. It will be continued in the survivors, and not be permitted, in any event, to fail, for want of a trustee. This is the doctrine of Chancellor KENT, in the case of *Franklin v.*

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Osgood, 2 Johns. Ch. 19, and cases there cited ; and is in accordance with numerous decisions in the English courts. 3 Atk. 714 ; 2 P. Wms. 102. And is adopted and sanctioned by the court of errors in New York, on appeal, in the case of *Franklin v. Osgood*. And Mr. Justice PLATT, in that case, refers to a class of cases in the English courts, where it is held, that although, from the terms made use of in creating the power, detached from other parts of the will, it might be considered a mere naked power to sell ; yet, if, from its connection with other provisions in the will, it clearly appears to have been the intention of the testator, that the land should be sold to execute the trusts in the will, and such sale is necessary for the purpose of executing such trusts, it will be construed as creating a power coupled with an interest, and will survive. This doctrine is fully recognised by the supreme court of Pennsylvania, in the case of the *Lessee of Zebach v. Smith*, 3 Binn. 69. The court there considered it as a settled point, that if the authority to sell is given to executors, *virtute officii*, a surviving executor may sell ; and that the authority given by the will, in that case, to the executors, to sell, was to them in their character of executors, and for the purpose of paying debts, an object which is highly favored in the law.

Although the clause in the will now under consideration, does not name the executors as the persons who are to sell the land, yet it is a power vested in them, by necessary implication. The land is to be sold for the purpose of paying the debts, which is a duty devolving upon the executors ; and it follows, as a matter of course, that the testator intended his executors should make the sale, to enable them to discharge the duty and trust of paying the debts. Mr. Sugden, in his Treatise on Powers, page 167, on the authority of a case cited from the Year Books, lays it down as a general rule, that when a testator directs his land to be sold, for certain purposes, without declaring by whom the sale shall be made, if the fund is to be distributed by the executors, they shall have, by implication, the power to sell. And this is the doctrine of Chancellor KENT, in the case of *Davoue v. Fanning*, 2 Johns. Ch. 254. The will, in that case, as in this, directed the real estate to be sold, for certain purposes therein *specified, but did not direct expressly by whom the sale should be made ; and he held, as Lord [*566 HARDWICKE did, in a case somewhat similar (1 Atk. 420), that it was a reasonable construction, that the power was given to the executors ; that it was almost impossible to mistake the testator's meaning on that point. So, in the present case, it is impossible to draw any other conclusion, than that it was the testator's intention, that the sale should be made by his executors. *McDonald v. Hewitt*, 15 Johns. 349, is a case very much in point, on both questions ; that the power in this case, is coupled with an interest, and survives, and that by implication, it is to be executed by the executor. The testator, say the court, in that case, directed, that in case of a deficiency of his personal estate to pay his debts, some of his real estate should be sold, without naming by whom ; and one of the executors only undertook the execution of the will, and sold the land ; and the court held, that this was a power coupled with an interest, and might be executed by one of the executors, it being a power to sell for the payment of debts.

It has been thought proper to dwell a little more at large upon the construction of this will, and the power given to the executors to sell, than would have been deemed necessary, had it not been supposed and urged at

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the bar, that the court of appeals in Maryland had given a different construction to the will than the one we have adopted. This will was brought under the consideration of that court, in the ejectment suit for the recovery of the Dulin farm already referred to (4 Gill & Johns. 323), and it is true, the court does say, that the power given in the will to sell is a mere naked power. But this was not the main point before the court. The question seemed to turn upon the demises in the declaration, and whether the legal estate in the land was in Mrs. Peter and her children, so as to enable them to maintain an action of ejectment. As the clause in the will, directing a sale of the land, did not direct it to be made by the executors, it became a question, whether the executors had that power by implication; or whether it was a case coming within the Maryland law of 1785, which provides, that if a person shall die, leaving real or personal estate to be sold for the payment of debts, or other purposes, and shall not appoint a person to sell and convey the property, the chancellor shall have the power to appoint a trustee for that purpose. And the court seemed to think, the will now in question came within that provision. But this case, however respectable the authority may be, cannot be admitted to control the decision in *the case now before the court, where the lands in question lie in *567] the city of Washington; and we entertain a very decided opinion, that the power to sell given by this will, is a power coupled with an interest, which survives, and may be executed by the surviving executor.

The next inquiry is, whether there is any subsisting debt due from the estate of David Peter to the banks. It is contended on the part of the complainants in the court below, that this debt has been extinguished, by the notes given by the executors; and no longer remains a debt due from the estate. There is no pretence that these debts have, in point of fact, been paid; and if not, the trust has not been executed, and the land still remains charged with it. If the executors have paid the debt to the banks, or the banks have accepted their notes in payment, in place of the notes of the testator, so that the executors became the debtors, and personally responsible to the banks; the only effect of this is, that the executors became the creditors of the estate, instead of the banks, and may resort to the trust fund to satisfy the debt. 2 P. Wms. 664 note; 7 Har. & Johns. 134; 4 Gill & Johns. 303; 2 Pick. 567. But there is no ground for considering the debt of the banks extinguished. David Peter, at the time of his death, was largely indebted to these banks, upon indorsed notes discounted by them; and to prevent these notes from lying under protest, an arrangement was made between the banks and the executors, to substitute notes made by Sarah Peter, and indorsed by Leonard H. Johns and George Peter; and the notes of David Peter were retired by this substitution, and passed as credits to the executors, in the orphans' court, as paid, when, in truth and in fact, they were not paid. The substitution of the notes of the executors was only by way of renewal, and to comply with the rules of the banks, and thus to continue the debts, by the indulgence of the banks, until the executors should be able to make sales for the payment of them, without any intention or understanding by any of the parties, that the substituted notes were offered or received as payment of the debts. That such was the arrangement made respecting these debts, and so understood by Beverly, at least, is established by the most clear and satisfactory evidence;

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and there is good reason to believe, that this was well understood in the family, by all the children who were of an age sufficient to understand the business and concerns of the estate. This arrangement, under such circumstances, cannot, in any manner, be considered an extinguishment of the debt. The law on this subject is well settled, and the *principle well and succinctly laid down, in the case of *James v. Hackley*, 16 Johns. 277. [*568 It is, say the court, a settled doctrine, that the acceptance of a negotiable note, for an antecedent debt, will not extinguish such debt, unless it is expressly agreed, that it is received as payment. It is unnecessary, in the present case, to carry the principle so far, as to say, there must be an *express* agreement for that purpose, in order to operate as payment; but the evidence must certainly be so clear and satisfactory, as to leave no reasonable doubt that such was the intention of the parties. And the rule, to this extent, is settled by the most unquestioned authority. 11 Johns. 513; 14 Ibid. 404; 2 Gill & Johns. 493; 7 Har. & Johns. 92.

In the original bill, the complaint against the executors, for not having collected the balance of the purchase-money, can hardly be considered a charge of negligence; and much less, of that gross negligence which ought to make the executor personally responsible. It barely alleges, that this balance ought to have been received, if the executors had only used reasonable diligence in regard to the collection. But after the answer and explanation of the executor to this charge came in, an amended bill was filed, charging the executor with gross negligence in this respect. This seemed to be an after-thought, and rather a stale allegation. But the answer and explanation of the executor, uncontradicted in any manner, fully exonerates the executors from all culpable negligence. Magruder was prosecuted for the balance of the purchase-money; he became insolvent, and no further payment could be obtained from him. An ejectment was brought to recover possession of the land, that it might be again sold; the cause was tried in the county court, and removed to the court of appeals, where the judgment was reversed, and a *procedendo* awarded. This business was principally under the care and direction of the complainant, Beverly; and if there was any want of due diligence in prosecuting the suit, it is chargeable to him, and not to the executor. And besides, the executor in the whole of this business acted under the advice of counsel, which shows satisfactorily, that he acted in entire good faith, and would go very far to exonerate him from the charge of negligence, even if there were circumstances leading to a contrary conclusion. 2 Johns. Cas. 376.

From this view of the case, we are satisfied, that the direction in the will of David Peter to sell a portion of his real estate for payment of his debts, created a power coupled with an interest, that survives. That the surviving executor is, by necessary implication, the person *authorized to execute that power and fulfil that trust. That the debt due the banks [*569 has not been extinguished, by the notes substituted by the executors, as renewals, in the bank, or the estate of the testator in any way discharged from the payment of the debt. That the executors are not chargeable with negligence or misapplication of the personal estate, that ought to render them personally responsible for these debts; and that no reason has been shown, why satisfaction of these debts should not be had out of the lands appropriated by the testator for that purpose.

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It remains only very briefly to notice the exceptions which were filed to the report of the auditor ; and most of these have been disposed of, by the principles laid down in the foregoing opinion. It is proper here to observe, that from the report of the auditor upon the accounts exhibited by the executors, and allowed by him, there has at all times been, and now is, a considerable balance in favor of the executors against the estate.

With respect to the first and second exceptions, it is true, that the auditor has not charged the executors with the inventories ; and he ought not, according to the principles upon which he makes his statement ; the object of the reference to him being to ascertain, whether the executors were indebted to the estate, or the estate to them ; and for this purpose, he examined the several statements made by the executors with the orphans' court, and extracted from them the several sums received and paid by them. In the account with the orphans' court, the executors are charged with the amount of the inventory of the personal estate, both in the district of Columbia and in Maryland ; and so far as any proceeds of the personal estate came into the hands of the executors, they are charged in the statement of the auditor ; but they are not charged with what the widow and heirs retained in their hands, and for their own use ; and this was correct, according to the provisions in the will, for the maintenance of the family and the education of the children. The \$4552, mentioned in the third exception, was properly omitted in the statement of the account against the executor. It was a portion of that part of the estate which was put into the hands of the widow, attached to the dwelling-house, and with respect to which the testator directed that no appraisement or valuation should be made. The fourth and fifth exceptions relate to the notes taken from Magruder for the balance of the purchase-money *570] of the Dulin farm. *The executors, as has been already shown, are not chargeable with those notes. No negligence is imputable to them, which ought to make them personally responsible. No title has been given for the farm, and if it may yet be resorted to, for payment of this balance of the purchase-money.

The auditor has properly given credit to the executors for the taxes on the real estate. There is no suggestion, that the taxes were not due, and paid by somebody. The amount appears to have been paid, according to the account of the register ; and it is fairly to be presumed, that they were paid by the executors, although no regular vouchers are produced for such payment. This may be accounted for, in some measure, at least, by the circumstances stated in the answer of George Peter, of the destruction by fire of the books and accounts of his co-executor, Leonard H. Johns, who had the principal management of the estate.

The allowance of \$6000 for the expenses of the family for twelve years, must certainly be a very moderate charge. It was a proper subject of inquiry for the auditor, and there are no grounds upon which this court can say the allowance is exceptionable. From the nature of the expenditure for the daily expenses of the family, it could hardly be expected that a regular account would be kept ; and especially, under the large discretion given by the testator in his will, in relation to his maintenance of his family.

The amount paid by the executors for the curtails and discounts on the notes running in the banks, was properly allowed to their credit. These

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were debts due from the estate ; and whatever payments were made, were for, and on account of, the estate. These are all the exceptions taken to the report of the auditor, and we think they were all properly overruled in the court below. But the court erred in decreeing a perpetual injunction.

The decree of the circuit court must accordingly be reversed, the injunction dissolved, and the bill of the complainants dismissed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel : On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed and annulled. And *this court, proceeding to render such decree as the said circuit court ought to have rendered in the premises, doth order, adjudge and decree, that the injunction in this cause be and the same is hereby dissolved ; and that the bill of the complainants be and the same is hereby dismissed ; and that this cause be and the same is hereby remanded to the said circuit court, with directions to said court to carry this decree into effect.

*SAMUEL DICKINS, Plaintiff in error, v. WILLIAM H. BEAL. [*572
Bills of exchange.

Bills of exchange were drawn and dated at Hazelwood, Madison county, Tennessee, by D. & T. on W. & F., at New Orleans, the drawers having no funds in the hands of the drawees, or authority from them to draw such bills ; W. & F. had written to the cashier of the branch Bank of the United States, at Nashville, informing him, that D. & T. were authorized to make negotiations, by bills on them, with the bank, and that such bills would be honored ; but the bills on which this suit was instituted by the holder and indorsee, residing in New Orleans, were not negotiated with the bank ; the bills were refused acceptance by W. & F. ; were protested for non-acceptance, on the same day, and notice of the same was given by the notary to the drawers and indorser, by letters put into the post-office, addressed to them at Hazelwood, Madison county, Tennessee ; the notary, as was testified, not knowing of any other residence of the parties than that designated in the caption of the bill ; and that he made inquiry for further information, of persons likely to know. Evidence was given, to show that letters from New Orleans for Hazelwood, in Madison county, West Tennessee, were sent to Nashville, and that from that post-office they were sent to Spring creek post-office ; that D., the drawer of one of the bills, and the indorser of the other, was the post-master at Spring creek, Madison county, Tennessee ; Hazelwood was near Spring creek post-office. It was also testified, that letters from New Orleans, for the western district of Tennessee, came to Nashville for distribution, unless there was a river mail, in which case, they would be delivered at Memphis, and be distributed thence. The letters of W. & F. to the cashier of the branch Bank of the United States, at Nashville, were offered in evidence by the drawers of the bills, to show that they were entitled to regular notice of the protest of the bills : It was held, that the circuit court properly rejected this evidence, as the letters did not apply to, and had no connection with, the bills which were the subject of this suit.

An established exception to the general rule, that notice of the dishonor of a bill must be given to the drawer, is, where he has no funds in the hands of the drawee ; but of this exception there are some modifications : if the drawer has made, or is making, a consignment to the drawee, and draws before the consignment comes to hand ; if the goods are in transitu, but the bill of lading is omitted to be sent to the consignee, or the goods were lost ; if the drawer has any funds or property in the hands of the drawee, or there is a fluctuating balance between them in the course of their transactions ; or a reasonable expectation that the bill would be paid ; or if the drawee has been in the habit of accepting the bills of the drawer, without regard to the state of their accounts, this would be deemed equivalent to

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effects; or if there was a running account between them. In all such cases, the drawer is considered as justified in drawing, so far as his having a right to draw; that "the transaction cannot be denominated a fraud; for in such case, it is a fair commercial transaction, in which the drawer has a reasonable expectation that his bill will be honored; and he is entitled to the same notice as a drawer with funds, or authority to draw without funds."

*573] But unless he draws under some such circumstances, his drawing without funds *property or authority, puts the transaction out of the pale of commercial usage and law; and as he can in no wise suffer by the want of notice of the dishonor of his drafts, that it is deemed an useless form.¹

Notice of the dishonor of bills of exchange must be made out in two ways: 1. That the bills had been duly protested for non-acceptance; and due and legal diligence used in giving notice thereof to the parties on the bills; in which case, the legal presumption of its receipt in time would attach. 2. By proof that the notice actually came to hand in proper time; though the letter containing the notice was not properly directed, or sent by the most expeditious or direct route. The facts of notice, and its reception in due time, are the only matters material to the drawer or indorser of a dishonored bill; the manner or place in which they receive such notice is immaterial; for all the objects to be answered by its reception, it is equally available to them. To the holder, it is immaterial, whether the evidence of notice consists in the legal presumption arising from due diligence, which supplies the place of specific evidence, and is binding on a jury as proof of the fact of its reception; or it is established by direct evidence, or such circumstances as will in law justify them in drawing the inference.²

Since the case of *Buckner v. Findley*, 2 Pet. 589, 591, decided on great consideration, it has been the established doctrine of this court, that a bill of exchange, drawn in one of the states of this Union, on a person in another, is a foreign bill, and to be treated as such; and that in this respect, they are to be considered as states foreign to each other, though they are otherwise, as to all the purposes of their federal constitution. Among these purposes, are the establishment of post-offices and post-roads; the usage of the officers employed in the various details of the operations of the department, when acting within the line of their duty, as prescribed by law and regulations, becomes all-important to a court and jury, in deciding on what is legal diligence in giving notice, or what is evidence of its reception.

It is legal diligence in the holder of a bill, if he avails himself in time of the means of communicating notice, which are thus afforded; but he is not answerable for any defects in the outlines or details of the regulation of the mails, for the route in which the letter is carried, the time which elapses from its deposit in the office and delivery, or the mode of carrying or distributing the mails; but it is proper, that he should give evidence of all these matters, as well to repel the imputation of *laches*, if the letter does not come to hand, or not in due time, as to prove its regular delivery, if there should be any doubt as to the use of diligence, in the direction or deposit of the letter; such evidence is uniformly received, in cases arising on the notice of dishonored bills.

It is sufficient proof that bills of exchange were protested for non-acceptance or non-payment, if the notary testifies he put notice thereof into the post-office, without producing a copy of the notice, or proving its contents.

What will be considered as due diligence in giving notice of the dishonor of a bill of exchange, as between the holder and the drawer or indorser of a dishonored bill. The question of their liability depends not on actual notice, but on reasonable diligence; which is, in all cases, tantamount to actual notice, whether given or not.

¹ *Rhett v. Poe*, 2 How. 457; *Valk v. Simmonds*, 4 Mason 118; *Ex parte Brown*, 2 Story 502; *Baker v. Gallagher*, 1 W. C. C. 461; *Read v. Wilkinson*, 2 Id. 514; *Hopkirk v. Page*, 2 Brock. 20; *Allen v. King*, 4 McLean 128; *Cox v. Simms*, 1 Cr. C. C. 238; *Hoffman v. Smith*, 1 Caines 157; *Van Wart v. Smith*, 1 Wend. 219; *Wollenweber v. Ketterlinus*, 17 Penn. St. 389. But where the drawer has any funds in the hands of the drawee, or, at the time the bill is drawn, there are circumstances sufficient to induce a reasonable expec-

tation that the bill will be accepted and paid, the drawer is entitled to due diligence in presentation and notice of dishonor. *Robinson v. Ames*, 20 Johns. 146. And see *Dollfus v. French*, 1 Denio 367.

² After due diligence has been used, and notice sent accordingly, the holder is not obliged to give any further notice, on discovering that the indorser did not reside at the place to which the notice was directed. *Lambert v. Ghiselin*, 9 How. 552. And see *Bank of Utica v. Bender*, 21 Wend. 648.

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As the bills on which this suit was brought were foreign bills, the protests produced at the trial were in themselves evidence of the demand and protest; the oath of the notary, that he put the notice into the post-office, on the day of protest, is competent and sufficient in law, to prove the fact.

*ERROR to the Circuit Court for the district of West Tennessee. [*574

This case was submitted to the court, without argument, by *Porter* and *Crittenden*.

BALDWIN, Justice, delivered the opinion of the court.—Samuel Dickins, the defendant, and Jesse Taylor, were partners, transacting business at Hazelwood, Madison county, Tennessee, which was the residence of Dickins. On the 6th of December 1832, Taylor drew a bill of exchange for \$1448, on Wilcox & Feron, New Orleans, in favor of Dickins, payable on the 1st of May 1834, which Dickins indorsed to the plaintiff. On the same day, Dickins & Taylor drew two other bills on the former house, in favor of the plaintiff; one for \$2802, payable the 1st of May; the other, for \$1590, payable the 1st of April 1834. The three bills were dated at Hazelwood, Madison county, Tennessee; presented to the drawers, on the 3d of June 1833, for acceptance; which being refused, they were protested for non-acceptance by a notary-public; who, on the same day, gave notice thereof to the drawer and indorser of the first, and the drawers of the other two, by letters put into the post-office, addressed to them at Hazelwood aforesaid. It was testified by the notary, that, not knowing of any other residence of the parties than that designated by the caption of the bill, he forwarded the notices accordingly, after inquiring of persons likely to know.

It appeared, that all the bills were drawn without funds, or authority to draw; nor was any evidence offered, to show that either Dickins or Taylor had any reason to think that their bills on Wilcox & Feron would be honored, except two letters from Wilcox & Feron, dated the 1st of December 1831, addressed to the cashier of the branch Bank of the United States, at Nashville. In one, they say, "Messrs. Dickins & Taylor are authorized, in making negotiations, to value on our house in New Orleans, for say \$10,000; in such form and at such time as they may think proper, and same will be duly honored." In the other, "our friend, Colonel Samuel Dickins, is authorized, in negotiating with your institution, to value on our house in New Orleans, at any time, for such sums as he may think proper; and same will be duly honored by W. & F." *These letters were in the handwriting of Wilcox & Feron, and in the possession of Dickins; they were offered to show that he was entitled to regular notice of the protest of the bills drawn by Dickins & Taylor; but were rejected by the court as incompetent.

The plaintiff resided at New Orleans. Jackson is the county town of Madison county, Tennessee, about fourteen miles from Hazelwood, the defendant's residence, which is on Spring creek, about half or three-fourths of a mile from a post-office called Spring Creek post-office, of which the defendant was postmaster, and did his business there in June 1833. This was known to plaintiff, who, about and before the 3d of June 1833, directed a letter to defendant at "Hazelwood, Spring Creek, Madison county, Tennessee," and one to "Colonel Samuel Dickins, postmaster, Spring Creek,

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Madison county, Tennessee." At the trial, the plaintiff offered to prove, by the postmaster at Nashville, and his deputy, that that place was the distributing office for letters from New Orleans, intended for West Tennessee, including the county of Madison ; that in June 1833, they knew defendant was postmaster at Spring Creek ; that if, in distributing the mail, they had seen a letter addressed to defendant at Hazelwood, they would have sent it to Spring Creek post-office. Also, to prove, by the post-office books at Nashville, that on the 13th of June 1833, the New Orleans mail arrived at Nashville ; and on the 14th, a package was sent to Spring Creek post-office, which had come to Nashville for distribution, and was rated at fifty cents postage. To this evidence, it was objected by the defendant, that inasmuch as the putting a letter into the post-office, containing notice of a protest, properly directed, forms a conclusive legal presumption that such notice was duly given and received ; it was also a legal presumption, that the notice went to the place directed, and no other ; and that the plaintiff was concluded from showing, either that the destination of the letter was changed on its passage, or was in point of fact sent to any other place. The court overruled the objection, and the evidence was received.

It was also testified, that letters from New Orleans, for the western district of Tennessee, came to Nashville for distribution, unless there was a river mail, in which case, they would be delivered at Memphis, and be distributed thence ; other evidence was also given, in relation to the course of the mail, and the usage of the post-office at Nashville, which is needless to recite. In their charge to the jury, the court instructed them, that the usage of a distributing office, in *conformity to law, and the authorized regulations of the department, and in the discharge of the official duties of the officers employed, might properly be taken into their consideration of the question submitted to them ; which was, whether, from the usual course of the mail, and the usage as proved, the notice of the protest would necessarily reach Spring Creek post-office, or would fail to reach it, or be carried to some other office ; in the first case, the court instructed them, that the notice was served on the defendant ; but in the other, the drawer was discharged, unless actual notice was served.

*576] Several instructions were prayed by the defendant, which the view taken by the court renders it unnecessary to consider, as they relate to matters not material to the cause ; and if given either way, they could not affect the right of either party. One, however, deserves particular notice, which was, "that the evidence of the notary was not sufficient proof that a legal notice was sent ; but that he ought to have set out a copy of the notice, or stated its contents, in order that the court might judge whether it was sufficient." The court refused to give this instruction ; but stated, that it might reasonably be inferred from the nature of the notice, and from the fact that notice was given, as stated in the deposition. Exceptions were taken to the decision of the court on the questions of evidence, and the various matters given in charge to the jury.

The first question which arises, is, on overruling the admission in evidence of the two letters from Wilcox & Feron to the cashier of the branch bank at Nashville. It was in full proof, that Taylor & Dickins never had a dollar in the hands of Wilcox & Feron, to pay any draft drawn on the latter, nor any money or other property in their hands, to meet the bills at

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the time they became due, nor any funds in their hands, when presented and protested for non-acceptance. No proof was offered that Dickins & Taylor, or either of them, had made any consignments to Wilcox & Feron as an expected or anticipated fund on which to draw. It was also proved, that Jesse Taylor had neither funds or property in the hands of the drawees, when his bill in favor of Dickins was presented for acceptance, or when it became due ; and that they had received no advice of such bill ; and that the two bills of Dickins & Taylor, drawn in favor of the plaintiff, one for \$2802, and the other for \$1598, balanced their accounts on his books. It is clear, therefore, that this transaction was not a negotiation, within the meaning or intention of these letters ; *they evidently referred to [*577 negotiations at the bank, or within the sphere of its operations in the commercial transactions of the firm ; the one referring to Dickins alone, was expressly limited to negotiations with that bank. The remittance of these bills to New Orleans, in payment of an antecedent debt to the plaintiff, was, in no sense of the term, a negotiation of them ; and was so utterly inconsistent with the evident object of the letters, that the most remote expectation could not have been entertained, that they would have been accepted.

A mercantile house, conducting operations at Memphis and New Orleans, would, in the course of their business, lend their credit in anticipation of consignments ; while they would refuse it to pay the debts due to other persons ; these considerations could not escape the consideration of Dickins & Taylor, when they sought to make Wilcox & Feron their creditor, instead of Beal, by such a fraudulent abuse of the letters of credit. Had these bills come to the hands of an innocent holder, in the course of trade, with a knowledge of these letters, the case would have been different ; or if the bank had negotiated them, there would have been a reasonable expectation that they would have been honored ; but Dickins & Taylor could have entertained no such expectation. The letters were, therefore, properly excluded, and the case must be considered as if they had not existed.

An established exception to the general rule, that notice of the dishonor of a bill must be given to the drawer is, where he has no funds in the hands of the drawee ; but of this exception, there are some modifications. 4 Cranch 154 ; 1 T. R. 405 ; 2 Ibid. 712 ; 12 East 175 ; 20 Johns. 149-50. If the drawer has made, or is making, a consignment to the drawee, and draws before the consignment comes to hand. 16 East 175. If the goods are *in transitu*, but the bill of lading is omitted to be sent to the consignee, or the goods were lost. Ibid. 43. If the drawer has any funds or property in the hands of the drawee ; or there is a fluctuating balance between them, in the course of their transactions (15 Ibid. 221) ; or a reasonable expectation that the bill would be paid. 4 M. & S. 229-30. Or, if the drawee has been in the habit of accepting the bills of the drawer, without regard to the state of their accounts, this would be deemed equivalent to effects. 12 East 175. Or, if there was a running account between them. 15 Ibid. 221. In all such cases, the drawer is considered as justified in drawing, *as so far having a right to draw, that "the transaction cannot be denominated a fraud ; for in such a case, it is a fair commercial transaction, in which the drawer has a reasonable expectation that his bill will be honored ; and he is entitled to the same notice as a drawer with funds, or authority to draw without funds." 15 East 220 ; 16 Ibid. 44. But unless he draws

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under some such circumstances, his drawing without funds, property or authority, puts the transaction out of the pale of commercial usage and law; and as he can in no wise suffer by the want of notice of the dishonor of his drafts, that it is deemed an useless form. "Notice, therefore, can amount to nothing, for his situation cannot be changed." In a case where he has no fair pretence for drawing, there is no person on whom he can have a legal or equitable demand, in consequence of the non-payment or non-acceptance of the bill. This is the rule, as laid down by this court, in *French v. Bank of Columbia*, 4 Cranch 153, 164, on a very able and elaborate review of the then adjudged cases; which is fully supported by those since decided in England, and in the supreme court of New York. The case of the defendant falls clearly within the rule applicable to bills drawn without funds, or any *bond fide*, reasonable or just expectation of their being honored; and notice of their dishonor was not necessary. The case requires no opinion whether notice of the dishonor of Taylor's bill in favor of Dickins was necessary, and we forbear to express any.

The next question which arises, is, on the admission of the evidence of the postmaster at Nashville, and his deputy, in relation to the course of the mail, the usage of the office, and the facts to which they testify. We are at a loss to perceive any plausible objection to the evidence which was received by the court, on the assumption that notice of the dishonor of the bills must be made out by the plaintiff; which could be done in two ways. 1. That the bills had been duly protested for non-acceptance, and due and legal diligence used in giving notice thereof to the parties on the bills; in which case, the legal presumption of its receipt in time would attach. 2. By proof that the notice actually came to hand in proper time; though the letter containing the notice was not properly directed, or sent by the most expeditious or direct route. The fact of notice, and its reception in due time, are the only matters material to the drawer or indorser of a dishonored bill; the manner or place in which he receives *such notice is immaterial; for [579] all the objects to be answered by its reception, it is equally available to them. To the holder, it is immaterial, whether the evidence of notice consists in the legal presumption arising from due diligence, which supplies the place of specific evidence, and is binding on a jury as proof of the fact of its reception; or it is established by direct evidence, or such circumstances as will in law justify them in drawing the inference. 2 Pet. 132.

Since the case of *Buckner v. Finley*, 2 Pet. 589, 591, decided on great consideration, it has been the established doctrine of this court, that a bill of exchange, drawn in one of the states of this Union, on a person in another, is a foreign bill, and to be treated as such; and that in this respect, they are to be considered as states foreign to each other, though they are otherwise as to all the purposes of the federal constitution. Among these purposes is the establishment of post-offices and post-roads; the regulation of which has been delegated to the federal government, and is exercised by their laws, and the regulation of the post-office department conformable thereto. On these depend all the communications between the states by mail; the time of departure from different places; its route, place and course of its arrival and distribution. The usage of the officers employed in the various details of the operations of the department, when acting within the line of their duty, as prescribed by law and regulations, become

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all-important to a court and jury in deciding on what is legal diligence in giving notice, or what is evidence of its reception.

It is legal diligence in the holder of a bill, if he avails himself in time of the means of communicating notice, which are thus afforded ; but he is not answerable for any defects in the outline or details of the regulation of the mails, for the route in which the letter is carried, the time which elapses, from its deposit in the office and delivery, or the mode of carrying or distributing the mails ; but it is proper, that he should give evidence of all these matters, as well to repel the imputation of *laches*, if the letter does not come to hand, or not in due time ; as to prove its regular delivery, if there should be any doubt as to the use of diligence, in the direction or deposit of the letter. Such evidence is uniformly received, in cases arising on the notice of dishonored bills.

The next question arises on the prayer of the defendant to instruct the jury, that proof that the bills were protested and notice thereof *put into the post-office, was not sufficient, without producing a copy of [*580 the notice, or proving its contents. In *Lindenberger v. Beall*, the notary testified, that notice of non-payment was inclosed in a letter, addressed to the defendant at H., and put into the post-office at G.; he had no recollection of these facts, and only knew them from his notarial book, and the protest made out at the time ; from which, and his invariable practice, he presumed he had done so. This was held sufficient proof of such notice, and that it was unnecessary to give notice to defendant to produce it. 6 Wheat. 104, 106. In *Nicholls v. Webb*, the notary was dead ; but on a memorandum on the margin of the protest, it was stated in his handwriting, "Indorser duly notified in writing, 19th July 1819, the last day of grace being Sunday, the 18th ;" which was held competent proof of notice. 8 Wheat. 326, 330. In this case, the protests were produced at the trial, and the oath of the notary positive as to the fact of notice ; this is entirely equivalent to an entry on his books, proved only by his handwriting, after his death, or his belief, arising from the fact of having made such entry, connected with his uniform usage. It must, therefore, be taken as settled law, that such is sufficient proof that the notice required by law was given.

It remains to consider, whether the letter containing the notice was so directed and deposited in the post-office at New Orleans, as to comply with the law. In cases of this description, the true question is, whether due diligence has been used by the holder of the bill ; not whether he has given, or the defendant has received, notice ; both are immaterial, if reasonable diligence has been used. This consists in giving notice, if, after the usual and proper inquiries are made, it is practicable to give it ; but if, when this is done, the holder or notary cannot give the notice personally, where the parties reside in the same place, or does not know where to direct it by mail, the inquiry is diligence, without giving notice. After inquiring from other parties to the bill, and examining the directory, if the party's residence cannot be found (3 Camp. 263) ; if, on calling at his residence, or place where he transacts his business, he is not to be found, or any other person who can receive notice, it may be left there ; or, if his house of business or residence is locked up, and on audible knocking, no one answers, or the party has changed his former residence, or removed to the country, *no notice [*581

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is necessary. 9 Wheat. 599; 2 Pet. 102, 105, 129; 6 Dow. & Ry. 505; 20 Johns. 172, and cases cited.

Where the parties do not reside in the same place, diligence consists in sending notice by the first mail of the day of protest. 2 Wheat. 273; 9 Pet. 45. This is all that is necessary, if the letter containing the notice is properly directed. 4 Wheat. 438. If the residence of the party appears on the bill, the notice of protest, &c., must be directed there (12 East 433); if it does not so appear, then reasonable diligence must be used in making inquiry for his residence, and a reasonable time will be allowed to give notice, after ascertaining it; this has been held in case of notice to an indorser in April, of a protest in October preceding. Wightwick Exch. 76-7.

When all the facts are ascertained, diligence is a question of law. Wightwick 76; 1 Pet. 583. If the evidence is doubtful or contradictory, it is for the jury to decide (7 Ibid. 290); but in either case, it turns on what is the usage of the place (9 Wheat. 587), the habits of men of business, the kind and mode of inquiry usually made in similar cases. 2 Burr. 669; 2 H. Bl. 565; 3 Bos. & Pul. 601; 20 Johns. 174. Thus, a bill drawn by persons residing in Petersburgh, Virginia, on a house in New York, and dated there, being protested; a clerk of the notary made inquiry at the banks and elsewhere; and on being informed that the drawers resided at Norfolk, directed one notice to them there, and put another into the post-office, in New York, directed to them there; it was held sufficient. *Chapman v. Lipecombe*, 1 Johns. 294, 296; 13 Ibid. 433; 16 Ibid. 220; 20 Ibid. 174. If a bill is drawn, dated "Manchester" (or "London,"), without any other direction, notice of protest, directed to the drawer at Manchester, was held good, on the presumption that it would reach him, if so directed. 1 Russ. & M. 249-50. Notice directed to the residence or house of business of the party, is sufficient; the holder is not bound to show that notice is brought home, but only to employ the usual mode of conveyance; and the rules of diligence to which he is held, ought not to be such as will tend to clog the circulation of commercial or negotiable paper, by impairing the liability of those who have put it into circulation. 1 Pet. 583; 2 Ibid. 102, 129. If an indorser lives within a reasonable distance of a post-office, notice to him, directed to him, at his residence, is good; as, where *a note was protested at Cincinnati, the notice was directed to *582] T. D. C., Campbell county, Kentucky, though defendant lived on the south side of the Ohio, two miles from Cincinnati and Covington, and three miles from Newport, the county town; in all of which there were post-offices, and his residence was well known to the holder and postmaster. The putting the notice into the post-office, at Cincinnati, was held sufficient. 2 Pet. 549.

The clear and conclusive result of these cases is, that as between the holder and the drawer or indorser of a dishonored bill, the question of their liability depends not on actual notice, but on seasonable diligence, which is in all cases tantamount to actual notice, whether given or not. Hence, it becomes useless to examine into the instructions prayed for by the defendant at the trial, and refused by the court, in relation to the course of the mail, after leaving New Orleans, or the points submitted to the jury; for they could in no event avail the defendant, if the jury believed the evi-

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dence of the notary. As these were foreign bills, the protests produced at the trial were in themselves evidence of the demand and protest. 8 Wheat. 330. The oath of the notary, that he put the notice into the post-office, on the day of protest, is competent and sufficient in law to prove the fact ; the only question for the jury was his credibility. The notices were properly directed : 1. Because Hazelwood was the residence of the defendant, within a short distance of a post-office ; 2. The bills were dated at that place, and the direction of the notices was to the same place. As a matter of law, then, we are clearly of opinion, that due diligence was used by the plaintiff, when the notices of protest were put into the post-office, at New Orleans. His right of action was then consummated, and it can in no wise be affected by the course of the mail, or the arrangements concerning its route or distribution. We forbear any notice of the other questions presented at the trial, lest by doing so, we should, by implication, be deemed to think they could in any event affect the right of the plaintiff, when no *laches* could be imputed to him or the notary. The judgment of the circuit court is affirmed, with costs and interest.

Judgment affirmed.

*JOSEPH WALLINGSFORD, Plaintiff in error, v. SARAH ANN ALLEN, [*583
for herself and children.

Slavery.

A wife having separated herself from her husband, for ill-treatment by him, applied to the county court of Prince George, Maryland, for alimony, which was allowed to her, *pendente lite* ; the husband gave the wife a female negro slave, and some other property, in discharge of the alimony ; she removed to Washington, hired out the slave, and afterwards, in consideration of a sum of money, and for other considerations, she manumitted, by deed, the slave, and her two infant children, the eldest not three years old ; some time after the agreement between the husband and wife, a final separation took place between them, by a verbal agreement ; each to retain "the property each had, and to be quits for ever," and the wife relinquished all further claim for alimony ; after the death of the wife, the husband claimed the female and her children, as his slaves : *Held*, that they were free by virtue of the deed of manumission executed by the wife.

This is a case where a transfer of property must be considered as having been made for a valuable consideration ; it was given in lieu of alimony, decreed by a court of competent jurisdiction, *pendente lite* ; and passed the property as fully to the wife, as if the husband had conveyed it to a third person for a valuable consideration ; in regard to that property, the wife is to be considered as a *feme sole* ; and her right to dispose of it followed, as a matter of course. Construction of the act of assembly of Maryland of 1796, relative to the manumission of slaves.

The terms of the Maryland act, and the policy of it, were meant to prevent the manumission of slaves, who, from infancy, age or decrepitude, would become burdensome to the community, at the time the deed of manumission should take effect ; and to such as were over age, after which manumission is prohibited. But the slave manumitted must either be positively in the latter predicament, or be so decrepid, if under the age of forty-five ; and if neither one nor the other, and being in infancy, it must stand so unrelated to any other free person, colored or white, that it can have no claim, natural or artificial, to support from any one ; and must, therefore, be a charge upon the charity of the community, or a charge upon its poor laws. It would be an unreasonable restraint upon the privileges of manumission, as it is granted in this act, if it were interpreted to exclude the manumission of mother and an infant child, the former being of healthy constitution and able to maintain it, as of other children who, in the natural progress of human life, would be able, in a few years, to maintain themselves by

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labor, and who would find in their adolescence, persons who would gladly maintain them for the services they could render.

Agreements between husband and wife, during coverture, for the transfer from him of property directly to the latter, are undoubtedly void at law; equity examines with great caution, before it will confirm them; but it does sustain them, when a clear and satisfactory case is made out, that the property is to be applied to the separate use of the wife; where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit, or of their family; or which has been appropriated by him to his uses; where the husband is in a "situation to make a gift of property to his wife, and distinctly separates *584] it from the mass of his property for her use; either case equity will sustain, though no trustee has been interposed to hold for the wife's use.¹

ERROR to the Circuit Court of the district of Columbia, and county of Washington. On the 4th day of August 1834, the defendant in error presented to the circuit court a petition, stating, that she and her two infant children were entitled to their freedom; and that she and they were unjustly held as his slaves, by Joseph Wallingsford, the plaintiff in error. Joseph Wallingsford appeared to the *subpoena* issued on the petition, and put in a plea, denying the claims of the petitioner. The case was tried by a jury, at the circuit court held in March 1835, and a verdict was found for the petitioner, under the charge of the court, from which the plaintiff in error took three bills of exception; and prosecuted, from the judgment of the court, this writ of error.

On the trial of the cause in the court below, the petitioner produced a regular deed of manumission, duly recorded, executed by Rachel Wallingsford, the wife of the plaintiff in error, dated the 8th of September 1826; by which, and for divers good causes and considerations, and in consideration of the sum of \$150 paid to her, she released the petitioner and her children from slavery; the petitioner being at that time nineteen years old, and her two female children of the respective ages of three years and five months.

The petitioner also proved, that Rachel Wallingsford resided in the city of Washington, for many years, as a *feme sole*, previous to the date of the deed; that she had a suit for alimony, depending in Maryland, against Joseph Wallingsford, he residing in that state; and that the court ordered her husband to pay her \$120 per year, as alimony, *pendents lite*; that some time after that allowance had been made to her, her husband gave petitioner to her, then about twelve years old, and some other property, in discharge of the order of alimony, his wife agreeing not to prosecute the claim any further; that after the petitioner was so given to Mrs. Wallingsford, she lived with her, or was hired out in Washihgton, until the date of the deed of manumission; that on the death of Mrs. Wallingsford, the plaintiff in error claimed her, and her children, as his slaves. The court permitted the deed of manumission to be read in evidence to the jury, by the counsel for the petitioner; expressly leaving it to the jury to say, or find from the evidence, whether the title of the said Rachel to the said negro, Sarah Ann, at *585] the time of the *execution of the said deed, was absolute, or only for the life of the said Rachel; and the court instructed the jury, that that question was open for their consideration upon all the evidence in the

¹ Hunt v. Johnson, 44 N. Y. 27; Coates v. Co. v. Neel, 54 Id. 9; Morris v. Zeigler, 71 Id. Gerlock, 44 Penn. St. 48; Pennsylvania Salt 450; Bedell's Appeal, 80 Id. 510.

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cause. The defendant in the circuit court excepted to the admission of the deed of manumission in evidence, and to the instructions given to the jury.

The defendant, by his counsel, prayed the court to instruct the jury, that if they should believe from the evidence aforesaid (viz., the evidence stated in the first bill of exceptions), that Mrs. Wallingsford held the petitioners, by virtue of an agreement made between her and her husband, without the intervention of a trustee; that said agreement is null and void, and could give no power to Mrs. Wallingsford to manumit the slaves held by virtue of such an agreement. The court refused to give this instruction, and the defendant excepted to the refusal.

The defendant prayed the court to instruct the jury, that if they should believe from the evidence, that an agreement was made between the defendant and Mrs. Wallingsford, by which she was to have the petitioners, in lieu of being supported by him as his wife; yet, if there has no covenant on the part of a trustee, or some one capable of contracting with the husband, that he should not be liable to the maintenance of his wife; the same is null. The court refused to give this instruction, and the defendant excepted.

The defendant prayed for the court to instruct the jury, that if they should believe from the evidence, that an agreement existed between him and Mrs. Wallingsford, that he should transfer the petitioner to her, on condition that she should relinquish all claim to alimony against him; that then, should the jury believe from the evidence, that she did not comply with this condition, and that she did prefer against him a subsequent claim for alimony; that then the agreement cannot be enforced against the defendant, nor can he be deprived of any of his rights, by virtue of the said agreement. The court refused to give this instruction, and the defendant excepted.

The defendant then prayed the court to instruct the jury, that if they should believe, from the evidence aforesaid, that the petitioners, or any of them, at the time of the execution of the deed of manumission aforesaid, were not able, by their labor, to procure for themselves sufficient food or raiment, with other necessary requisites of life, then the said deed of manumission, as to them, or such of them, was inoperative; which instruction the court gave, and also on the *prayer of the counsel for the petitioners, further instructed the jury, that if they should believe, from [^{*586} the said evidence, that the negroes above mentioned were of healthy constitutions, and sound in mind and body, and that their mother was capable by labor to procure to them sufficient food and raiment, with other requisite necessaries of life, and did maintain them, then, such children are not under the incapacity intended by the Maryland law. The defendant excepted to the last instruction.

The case was argued by *Brent*, for the plaintiff in error; and by *Dandridge* and *Key*, for the defendant.

Brent contended, that:—1. The court below erred in permitting the deed of manumission from Rachel Wallingsford, the wife, to be read in evidence, as stated in the first bill of exceptions. 2. That the court below erred in refusing to give the instructions prayed for by the plaintiff in

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error, in his second bill of exceptions. 3. That the court below erred in refusing to give the instructions as moved for in the third bill of exceptions 4. That the court below erred in refusing the instructions moved for in the fourth bill of exceptions. 5. That the court below erred in giving the instructions prayed for by the petitioners in the fifth bill of exceptions.

There is no denial, that Rachel Wallingsford was, at the time of the deed of manumission, the wife of the plaintiff in error. There had been no judicial separation, no divorce. Nor is it denied, that the defendant in error was, at one period, the slave of the plaintiff in error. The questions then which present themselves, are : 1. Whether a wife separated from her husband can do any act by deed, which will bind him at law, and deprive him of his property, without his express consent and authority. 2. Whether if a wife can so contract, yet is not the introduction of a trustee necessary ; and are not her acts, without the aid of a trustee, null and void. If no contract is valid, if none can be made ; then the plaintiff in error is right, and the judgment of the circuit court must be reversed.

There is an absolute disability in a wife to make any contract, or to execute any valid deed. 15 Serg. & Rawle 90 ; Petersdorff's *Abr. 53, *587] 55, 57, 65 ; Story's Conflict of Laws 125. In all these authorities, it is held, that a wife cannot execute a contract, separately from her husband. It is admitted, that there are exceptions to these principles ; as, when the husband has abandoned his wife, or has abjured the realm, she may contract ; but these exceptions have no application to the case before the court. It cannot be said, that the plaintiff in error abandoned his wife. She left him, and she resisted every effort to induce her to return. Cited, 2 Kent's Com. 160-61, 175-76 ; 4 Petersdorff, 40-1 ; 2 Har. & Johns. 485.

The instruction given by the circuit court, that the ability of the mother to maintain the children would be sufficient to legalize the manumission of the infants, was in direct opposition to decisions of the courts of Maryland, on the statutes of that state. For a considerable period, there was an express prohibition, by the laws of Maryland, of manumissions in any form. This was prior to 1796 ; it was the settled policy of the state, not to allow any slaves to be set free. By the act of 1715, ch. 44, § 22, all negroes were declared slaves for life ; and this law deprived the owners of slaves of the right to give any one of them freedom. Then came the statute of 1796, which prohibits manumission of persons not able to maintain themselves ; this act makes all deeds of manumission of such persons, absolutely void. But for the act of 1796, no manumissions could be made ; and none are valid, which do not conform to that law. It cannot be contended, that infants of three years old and under, have such ability. Cited, 6 Har. & Johns. 18-19 ; 4 Ibid. 262. These laws have full operation in the district of Columbia, on the east side of the Potomac ; and they govern the case before the court. They make the deed of manumission void, even if the grantor of the same was competent to give it. The decisions of the Maryland courts on this statute, made since the establishment of the district, may not be authority in this court ; but as they give a construction to the statutes of the state, the court will regard them as entitled to great consideration.

Dandridge and *Key*, for the defendant, insisted on the capacity of Mrs. Wallingsford to execute the deed. She was a *feme sole* ; she had

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been abandoned by her husband ; she was within the *exceptions to the rule which vacates the contracts or deeds of married women. Cited, 1 Kent's Com. 157 ; 6 Pick. 89 ; 15 Mass. 31 ; 2 Johns. Ch. 537 ; 1 Atk. 278. The agreement by which the defendant in error became the property of Mrs. Wallingsford, was a substitute for the allowance of alimony, and relieved the estate of her husband from a heavy responsibility. If no property in the slave was acquired by the wife, nothing was received by her ; and the effort now made is, to set up a fraud, for the benefit of the perpetrator of it. The very nature of the transaction made the defendant in error the separate property of Mrs. Wallingsford. It was left by the circuit court to the jury to say, whether the arrangement was not binding on the husband ; and they decided that it was. This gave the defendant in error and her children their freedom. It was entirely competent to the husband to give his wife this property ; and the facts of the case show, that the emancipation of the defendant in error was for a pecuniary consideration. The sum of \$150 was paid to her for the deed. She had been living in a different jurisdiction for many years : she was in great distress ; and her husband gave her the girl for the support and maintenance. She had a right to dispose of her as she did, to procure the means of living.

As to the construction given by the counsel for the plaintiff in error to the laws of Maryland, Mr. Key contended, that the 18th and 29th sections of the law of 1796, ch. 67, are different. In the one case, the case of a will, there are prohibitory words ; and not in the other. Further, the expressions in the 29th section are, slave or slaves ; any person having slaves may emancipate them, if sound, healthy, and able by labor to earn a living, &c. Now, these slaves in this deed, taking them, as the words allow, and as the spirit of the law would allow, in the aggregate, are able to maintain themselves. Again, the decision in such case should be, not that the deed is void, but that the freedom is not to commence by it, till the children are of sufficient age.

WAYNE, Justice, delivered the opinion of the court.—This was a petition in the court below, by the appellees, for freedom, complaining that they were unjustly held and claimed by the *appellant as his slaves. [*589 The petitioner gave in evidence a deed of manumission for herself and two children, from one Rachel Wallingsford. Her third child was born after she was manumitted.

It appears, that Rachel Wallingsford resided in Washington, several years previous to the date of the deed of manumission, living apart from her husband, the appellant ; that she had a suit pending against him in Maryland, where he resided, for alimony, and had been allowed, by the order of the court, \$120 per annum, *pendente lite*. Some time after this allowance had been made, her husband gave her the petitioner, Sarah Ann, and some other property, in discharge of her alimony ; that after this agreement between them, the said Rachel continued to live in Washington, until her death, having kept Sarah Ann in her service, until the deed of manumission was executed. After the death of Mrs. Wallingsford, the appellant claimed Sarah Ann and her children as his slaves. All of the children were born, after Sarah Ann was given up by the appellant to Mrs. Wallingsford. The appellant proved, at the time the deed of manumission was made, that

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Rachel Wallingsford was his lawful wife. It also appears, by a petition filed by the appellant in the county court of Prince George county, Maryland, to get the interlocutory order for alimony suspended, and which is in evidence in the cause, that the appellant and his wife, having had repeated disagreements, as she alleged, on account of her husband's habitual incontinency with a woman in their own house, Mrs. Wallingsford left her habitation and refused to live with him. The charge of incontinency is denied by the husband; but he admits, after his wife's departure, and upon her refusing to comply with his solicitations to return and live with him, that by an express agreement between them, he gave to her the woman Sarah Ann and other property, with two notes of hand, one for \$120 and the other for \$200; in all amounting to \$900; which was the amount the wife brought with her, when they were married, and of which the appellee Sarah Ann was a part. This was to be received by the wife, in full of all further claim for support; and the husband was to be discharged from the payment of alimony decreed by the court. Wallingsford having refused to pay the notes of hand, and the suit for alimony being still pending, the parties again met, and a final separation took place between them, upon the footing, that the wife was to retain the woman, Sarah Ann; that each was to retain besides, "the property each had, and to be quits for ever." In consideration of the husband *having agreed to this, the wife agreed to yield *590] her claim for alimony, granted by the interlocutory order of the court, and was to discontinue her suit.

On the trial of the cause, the admission of the deed of manumission, as evidence, was excepted to by the defendant; but the court overruled the exception. The defendant also prayed the court to instruct the jury, if they should believe, from the evidence, that Mrs. Wallingsford held the petitioners, by virtue of an agreement between her and her husband, without the intervention of a trustee, that the agreement was void, and could give to her no power to manumit the slaves held under it; also, if the jury shall believe, from the evidence, that the agreement was made without a covenant on the part of a trustee, or some person capable of contracting with the husband, that the same was null; also, if the jury shall believe, that the agreement was made, on condition that Mrs. Wallingsford should relinquish all claim to alimony, and that she did not comply with such condition, and did prefer against him a subsequent claim for alimony, that the agreement cannot be enforced against the defendant; and lastly, to instruct the jury, if they shall believe, from the evidence, that the petitioners, or any of them, at the time of the execution of the deed of manumission, were not able by their labor to procure for themselves sufficient food and raiment, with other necessaries of life, that then the said deed was inoperative to them. The court gave the last instruction to the jury, but refused to give the rest. And upon the prayer of the petitioner, instructed the jury, if they should believe from the evidence, that Sarah Ann Allen and her children were of healthy constitutions, and sound in mind and body, and that the mother was capable by labor to procure them sufficient food and raiment, with other necessaries of life, and did maintain them; then such children are not under the incapacity intended by the law of Maryland, in the act providing for the manumission of slaves.

The section of the act of 1796 (2 Maxcy's Laws of Maryland 360) is as

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follows : "that where any person or persons possessed of any slave or slaves, within this state, who are or shall be of healthy constitutions, and sound in mind and body, capable by labor to procure to him or them sufficient food and raiment, with other necessaries of life, and not exceeding forty-five years of age, and such person or persons, possessing such slave or slaves as aforesaid, and being willing and desirous to set free or manumit such slave or slaves, may, by writing under his, her or their hands and seals, evidenced by two *good and sufficient witnesses at least, grant to such slave or slaves his, her or their freedom ; and that any deed or writing, where-^{[*591} by freedom shall be given or granted to any such slave, which shall be intended to take place in future, shall be good to all intents, constructions and purposes whatsoever, from the time that such freedom or manumission is intended to commence by the said deed or writing ; so that such deed and writing be not in prejudice of creditors ; and that such slave, at the time such freedom or manumission shall take place or commence, be not above the age aforesaid, and be able to work and gain a sufficient livelihood and maintenance, according to the true intent and meaning of this act." The act prescribes how such deeds shall be executed, acknowledged and recorded ; and upon a compliance with what is prescribed in those regards, a copy of the record, duly attested under the seal, &c., "shall at all times hereafter be deemed, to all intents and purposes, good evidence to prove such freedom."

We will consider together, the exception taken to the introduction of the deed of manumission as evidence, the last instruction asked of the defendant, and that asked by the petitioners, both of which were given to the jury by the court. The deed was not objected to, for any deficiency in its execution, or on account of its not having been properly acknowledged and recorded. The last was done so far as that part of the law can be complied with in the district of Columbia. The deed was also acknowledged by the person making it, on the day it was executed, before a justice of the peace. It was then properly sent to the jury, as evidence of the fact of manumission ; and what its validity might be, to give freedom, was a question of law to be determined by the court. As to the instructions asked by the defendant and the petitioners, relative to the petitioners being comprehended within the incapacity of the section of the act of Maryland just recited ; both, we think, were rightly given by the court. That of the defendant was very general, and the court was not obliged by it to particularize to which of the petitioners it was intended to be applied. It was, therefore, correctly answered by a general instruction, directing the jury to inquire into the fact ; at the same time stating what the law was, if the jury should find the fact as the counsel of the defendant supposed it to be. That of the petitioners, being more specific, was intended to obtain the court's interpretation of the act upon the point put ; and we think the answer of the court is in the true spirit of the law. We think the terms of the *act of Maryland, and the policy intended by it, were meant to prevent the manumission of slaves, who, from infancy, aged or decrepitude, would become burdensome to the community, at the time the deed of manumission should take effect ; and to such as were over the age, after which manumission is prohibited. But the slave manumitted must either be positively in the latter predicament ; or be so decrepid, if under the age of forty-five ;^{[*592}

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and if neither one nor the other, and being in infancy it must stand so unrelated to any other free person, colored or white, that it can have no claim, natural or artificial, to support from any one ; and must, therefore, be at once a charge upon the charity of the community, or a charge upon its poor laws. It would be an unreasonable restraint upon the privileges of manumission, as it is granted in this act, if it were interpreted to exclude the manumission of mother and an infant child, the former being of healthy constitution and able to maintain it, as of other children who, in the natural progress of human life, would be able, in a few years, to maintain themselves by labor, and who would find, in their adolescence, persons who would gladly maintain them for the services they could render. If this construction of the act could not prevail, there can be no fixed age in childhood, when manumission can take effect ; and the act would be made to operate differently upon persons, by no certain rule. The legislature having laid down the age, after which manumission shall not be made, a strong presumption is raised, that it did not mean to exclude all infants absolutely from the benefits of the act, or it would have said so in terms ; or have fixed an age when, in childhood, manumission should be allowed. If the policy of the law is to prevent slaves from being manumitted, who would be burdensome to the community, we cannot hesitate in believing that the object will be accomplished, by relying upon those natural affections of a mother for her child, which have always been found strong enough to cherish and sustain it ; except in some unnatural instances, as when the true nature of woman has been turned aside by some dreadful superstition or extraordinary necessity.

We are aware, that opinions have been expressed in the courts of Maryland, different from our conclusion, in regard to the manumission of children ; but the point of a mother and infant manumitted at the same time, and the mother being in any way able, by her labor, to maintain her offspring, has not yet been decided against by the courts of Maryland, so far as we can *593] gather from their *reports. These opinions too, having been expressed since the cession of the district of Columbia to the United States, the courts in the district are not to be controlled by them in the interpretation of the act under review ; as they would be, and as this court would be, by the decisions of state courts, upon state statutes affecting local rights and interests.

The fourth instruction asked by the defendant, which the court refused to give, is, if the jury shall believe, that the agreement between Wallingsford and wife was, that he should transfer the petitioner to her, on condition that she should relinquish all claim to alimony against him ; and that she did not comply with the condition, and did prefer against him a subsequent claim for alimony ; that then the said agreement cannot be enforced against the defendant ; nor can he be deprived of any of his rights by virtue of said agreement. We think this instruction was rightly refused ; for though it is not denied, that the suit for alimony had not been discontinued, and was pending, when Mrs. Wallingsford died, the legal consequence would not be, that the agreement would be avoided by its not having been observed in that particular. The non-performance of the agreement in that regard, did not restore to the defendant the ownership of property for which he had received a valuable consideration, by the relinquishment of his wife's

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alimony ; of which he had the full benefit during her life ; and continues to enjoy in the greater means he is presumed to have from having been relieved from the payment of the wife's alimony. But the instruction was asked in face of the evidence ; which establishes the fact, that the substantial parts of the agreement were complied with, as the defendant had never been called upon for any part of the alimony, after the agreement was made, until the death of Mrs. Wallingsford. A failure upon the part of the wife to comply with this part of the agreement, gave to the husband a good ground in equity to have the suit discontinued ; but did not invalidate the agreement.

The remaining exceptions to be considered, are those relating to the nullity of the agreement ; because it was made without the intervention of a trustee, or some one capable of contracting with the husband. The court refused to give such instructions. The inability of the wife in this instance to contract, or to take any interest from her husband, without the intervention of a trustee, was argued, upon the restraints imposed upon women by the common law, during coverture. This is a case which cannot be so considered. Neither the nature of the action, by which the petitioners sue to have their freedom established, nor the agreement between Wallingsford and his wife, would permit this court to take so narrow a view of the case. Every feature of the agreement is an appeal to have it tested by those principles of equity which have been applied to maintain a separate interest in women, acquired from their husbands during coverture ; whether the same were made by the intervention of trustees or not ; when the transfer was fairly made upon a meritorious or valuable consideration.

Agreements between husband and wife, during coverture, for the transfer from him of property directly to the latter, are undoubtedly void at law. Equity examines with great caution, before it will confirm them. But it does sustain them, when a clear and satisfactory case is made out, that the property is to be applied to the separate use of the wife. Where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit, or of their family, or which has been appropriated by him to his uses. Where the husband is in a situation to make a gift of property to the wife, and distinctly separates it from the mass of his property for her use. Either case equity will sustain, though no trustee has been interposed to hold for the wife's use. In *More v. Freeman*, Bunn. 205, it was determined, that articles of agreement between husband and wife, are binding in equity, without the intervention of a trustee. Other cases may be cited to the same purpose. In regard to grants from the husband to the wife, an examination of the cases in the books will show, when they have not been sustained in equity, it has been on account of some feature in them, impeaching their fairness and certainty, as that they were not in the nature of a provision for the wife ; or when they interfered with the rights of a creditor ; or when the property given or granted had not been distinctly separated from the mass of the husband's property. In *Slanning v. Style*, 3 P. Wms. 334, Lord TALBOT assumed the doctrine, that *femes covert* could have a separate interest by their husband's agreement. In the case of *Lady Arundel v. Phipps*, 10 Ves. 146, 149, Lord ELDON held, that a husband and wife, after marriage, could contract, for a *bond fide* and valuable consideration, for a transfer of property from him to her. In

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Shepard v. Shepard, 7 Johns. Ch. 57, it is said, husband and wife may contract, for a *bond fide* and valuable consideration, for a transfer of property from him to her. *In *Walter v. Hodge*, 2 Swanst. 97, it is said, husband [595] may convey to the wife a chattel. In the case of a gift from the husband to the wife, it is held valid, when the husband, by some distinct act, divests himself of his property. As, for instance, in the case of *Lucas v. Lucas*, 1 Atk. 270, the lord chancellor held, that the transfer of 1000*l.* South Sea annuities by the husband, in the name of the wife, was so decisive an act, as amounted to an agreement by the husband that the property should become hers. It is not necessary to review here the cases of gifts to the wife by the husband, which have been sustained in equity. They are alluded to, to show how far equity has gone in maintaining transfers of property by the husband to the wife, without the intervention of a trustee; and when there was no valuable consideration money from the wife to the husband. But the case before us is one where a transfer of property must be considered as having been made for a valuable consideration. It was given in lieu of alimony, decreed by a court of competent jurisdiction, *pendente lite*; and passed the property as fully to the wife, as if the husband had conveyed it to a third person for a valuable consideration. In regard to that property, Mrs. Wallingsford is to be considered as a *feme sole*; and her right to dispose of it followed, as a matter of course. Judgment of the circuit court affirmed.

Judgment affirmed.

*569] *ROBERT Y. BRENT, surviving executor of ROBERT BRENT, use of the UNITED STATES, Appellant, v. The President and Directors of The BANK OF WASHINGTON.¹

Priority of the United States.—Lien of bank on shares of stock.

Robert Brent was the holder of 659 shares of stock in the Bank of Washington, and was indebted to the bank, as indorser on certain promissory notes, one of which became due after his death; he was also indebted to the United States, as paymaster; and he made an assignment of his property to satisfy the debt; the assignee did not accept the assignment; he died some time afterwards. The bank, under the provision of their charter, which gives a lien on the stock held by a debtor, for the payment of debts due to them, before the transfer of the stock held by a stockholder, insisted on the lien, against the claim of priority by the United States, and their claim was sustained by the court.

It has been the uniform construction of the 5th section of the act of 1797, and of the similar provision in the 65th section of the collection act of 1799, that whether in a case of insolvency, death or assignment, the property of the debtor passes to the assignee, executor or administrator; the priority of the United States operating, not to prevent the transmission of the property, but giving them a preference in payment out of the proceeds.

This preference is in the appropriation of the *debtor's estate*; so that if, before it has attached, the debtor has conveyed or mortgaged his property, or it has been transferred in the ordinary course of business, neither are overreached by the statutes; it has never been decided, that it affects any lien, general or specific, existing when the event took place which gave the United States a claim of priority.

Another rule is settled by these cases; that the priority does not attach to property legally transferred to a creditor on *respondentia*; though he may hold it subject to an account, equity or trust for the borrower; such transfer will be protected against the United States; though not

¹ See *Brent's Executors v. Bank of Washington*, 2 Cr. C. C. 517.

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an out and out sale in the course of business, so as to divest the equitable as well as the legal interest of the party.

Every stockholder of a bank, who makes or indorses a note, to procure a loan from the bank, is bound to know the terms of the charter and by-laws; his signature to the note is an inchoate pledge of his stock for security, if so provided in the charter; his stock gives credit to his name, and the bank grant the loan on its faith.¹

APPEAL from the Circuit Court of the district of Columbia, and county of Washington.

Robert Brent, a paymaster of the army of the United States, having become indebted to the United States, and being in an infirm state of health, on the 17th of May 1819, executed an assignment, stating the situation of his health, and his earnest desire to satisfy and adjust the claim of the government against him, as paymaster as aforesaid, and to do justice to others; and the better to secure these *objects and purposes, the assignment [*597 proceeded in the following terms :

"I have conveyed and assigned, and do, by these presents, convey and assign, in consideration of the premises, and for the sum of one dollar to me in hand paid, to George Graham, Joseph Pearson and Robert Y. Brent, all my real and personal estate, and property, in whatsoever consisting, and wheresoever situated, to them, the said George Graham, Joseph Pearson and Robert Y. Brent, their executors and administrators, and to the survivor of them, nevertheless, for paying and satisfying all just claim or claims of the government aforesaid, as well as for satisfying all just claim or claims of all others, as far forth as the said estate and property above conveyed will answer; with full power and authority to them, or the majority of them, to sell and convey, and to make good and sufficient titles to all or any part of the property referred to, in conformity with the intention and purpose of this writing; it being well understood, that the said trustees, after satisfying the purposes of the said trust, shall well and fully account with the said Robert Brent, his heirs, executors or administrators, for the execution of the trust aforesaid, and fully restore to the said Robert Brent, his heirs, executors or administrators, any overplus or surplusage that may remain of the estate aforesaid; and it being also understood, that the said Robert Brent reserves to himself the possession and use of such part of the property aforesaid as may be for his reasonable support and maintenance; and likewise the privilege of disposing of any part of the trust-estate, with the consent of the trustees, for the objects designated above." It was agreed, that the assignees refused to accept the assignment, or to act under it.

Robert Brent died on the 7th of September 1819, leaving real and personal estate; and the executors qualified, and took possession of his estate, in 1820. At the time of his death, he held 659 shares of stock in the bank of Washington; and at that time, he was indebted to the bank, as indorser, on two promissory notes: one for \$1000, made by Thomas L. Washington, and indorsed by Robert Brent, due and protested on the 22d of May 1819; the other, for \$667, also made by Mr. Washington, and indorsed by Mr. Brent, due and protested on the 29th of May 1819; he was also, at the

¹ A loan by a national bank to a stockholder, Lanier, 11 Wall. 869; Ballard v. Bank, 18 Id. does not give a lien upon his stock. Bank v. 689.

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time of his death, indorser of a promissory note, made by John Cooke, for \$400, which became due and was protested on the 19th of November *1819 : making, together with the other notes, the sum of \$2067; of [598] which \$1667 only were due at his decease. Some years after the death of Robert Brent, the Bank of Washington instituted a suit against the executors, on the note of \$400, and on the note of \$667; and on a plea of the statute of limitations, a verdict and judgment were rendered for the defendants.

The 11th section of the charter of the Bank of Washington provides, that "all debts actually due and payable to the bank (days of grace for payment being passed), by a stockholder requesting a transfer, must be satisfied, before such transfer shall be made, unless the president and directors shall direct to the contrary." The same section of the charter also declares, "that the shares of capital stock at any time owned by any individual stockholder, shall be transferable only on the books of the bank, according to such rules as may, conformable to law, be established in that behalf by the president and directors." The certificates of stock issued by the bank declare, that "the shares are to be transferred at the bank, by the stockholder, or his attorney, on surrendering the certificate of the same." There is also a provision in the section, which authorizes the directors to make regulations for the government and transactions of the bank, "conformable to law."

The executors of Robert Brent, in the year 1820, called upon the Bank of Washington, and requested to be allowed to transfer the stock held by their testator. This was refused, without the payment of the notes, the bank claiming the same, under the provision of the charter; which, it was insisted, gives the bank a right to be so paid. In 1835, the bank had retained dividends on the stock, and had sold a part of it, amounting to \$289.80.

Bills were filed in the circuit court, by the surviving executor of Robert Brent, for the use of the United States, against the Bank of Washington, claiming a right to transfer the stock for the payment of the debt due to the United States; on the allegation of the right of priority given to the United States by the act of congress. The Bank of Washington, at the same time, filed a bill claiming to appropriate the stock, by the sale of it, to the payment of the debt due to them; and asserting their right to a lien and to payment, under the provisions of the charter. The following agreement was made in the circuit court between the parties to these suits.

*" It is agreed by and between the said parties, that if the court [599] shall be of opinion, that the 11th section of the charter of the Bank of Washington, as follows, 'all debts actually due and payable to the bank (days of grace for payment being passed), by a stockholder requesting a transfer, must be satisfied before such transfer shall be made, unless the president and directors shall direct to the contrary,' confers upon said bank a specific lien upon the stock held by any stockholder indebted to said bank, the days of grace being passed, then the court may decree that the stock, or a sufficient amount thereof, held by complainant's testate in said bank, shall be sold at public sale, upon such terms as the court may think proper to impose, and by such trustee as they may appoint; and may further direct, that the proceeds thereof, after paying the expenses of the sale, and the

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costs of this suit, shall be applied to the payment of the notes hereinafter enumerated, and by this agreement admitted to be due and unpaid by the complainant's testate to the defendants; unless the court shall further be of opinion, that said lien granted by said charter is overreached, controlled and destroyed by the claims of the United States, now made, to a priority of payment out of said stock by virtue of the act of congress of 1799, ch. 128, § 65, as follows: 'in all cases of insolvency, or where any estate in the hands of the executors, administrators and assigns, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States shall be first satisfied.' Or, unless the court be further of opinion, that the claims or debts on said notes, due to said defendants, and herein-after particularly specified, upon two of which notes of said testate as herein-after described, it is agreed, suits were instituted by the defendants against the complainants, on the common-law side of this court, at the trial of which said suits, the complainants had, solely and exclusively, upon the ground of the plea of limitations, a verdict in their favor, were thereby extinguished, and the said lien, in consequence of said limitation, lost and destroyed; then the court to decree, if the claims of the United States to priority of judgment be allowed, that the proceeds of said sale be applied in payment of the debt due the United States; or unless they shall be of opinion, that the said lien is not affected by any such priority, but has been destroyed by the said verdicts in favor of complainants, then the proceeds of such sale to be applied to the payment of the note upon which no such verdict was rendered in favor of complainants."

*The circuit court, on the 26th of January 1826, made the following decree in the two cases. "These causes coming on to be heard, [**600] upon the bill, answers and exhibits, and the facts stated in the agreement entered into between the complainants and defendants, it is, this 22d day of January, in the year 1836, ordered and decreed by the court, that the stock of Robert Brent, deceased, standing in his name, in the Bank of Washington, or so much thereof as may be necessary to satisfy the several notes in the said agreement specified, be sold at public vendue, on the credit of sixty or ninety days, the purchasers to give notes with good indorsers, as the trustee may approve; notice being first given of the day of sale, in one of the city newspapers, and that J. Hellen be and he is hereby appointed a trustee to make said sale; and after paying the expenses of sale, and costs of suit, to defendants, he shall apply the proceeds of the sale to the payment of all the notes of said Brent, enumerated in the above statement, as due to said defendants; and it is further decreed, that the balance of said stock shall be transferred to the United States by said defendants, on the books of said bank." The United States prosecuted this appeal.

The case was argued by *Butler*, Attorney-General, for the United States; by *Key*, for the appellants; and by *Hellen*, for the appellee.

For the United States, it was contended, that at the time of the execution of the assignment, nothing was due by Robert Brent to the Bank of Washington. His liabilities were as indorser on certain promissory notes, which, to the amount of \$1667, became due after the assignment was made; and the residue of the debt claimed by the bank, \$400, became due after Mr. Brent's decease. The provision of the charter is in favor of debts ac-

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ally due, and the days of grace on a note must have expired, before the debt can be claimed. Thus, then, the United States, by the terms of the assignment, as well as by the operation of the statutes giving them a right of priority, became entitled to payment of the debt due to them, to the exclusion of the claims of the bank. The deed was an act of insolvency. In addition to the general principles which give the United States the prior right *601] to the property of their insolvent *debtor, so as to exclude all other creditors, the decree of the circuit court is erroneous, even if these principles do not apply; as the Bank of Washington is allowed to claim payment of the two notes on which suits were instituted, and judgments obtained in favor of the executors, on the plea of the statutes of limitation.

The priority claimed by the United States rests in this case on the 5th section of the act of congress of 1797 (1 U. S. Stat. 515), which extends the right of priority to all cases of insolvency. *United States v. Fisher*, 2 Cranch 358. The act of 1799 relates to duty bonds only. It is said, that there is no proof that Robert Brent was indebted to the United States. The precise amount of the debt is not stated; but the whole proceedings in the case go upon the ground, that he was so indebted. The assignment of 17th May 1819, contains an acknowledgment that he was indebted; and the agreed facts authorize the court to assume that he was a public debtor.

The next question is, whether Robert Brent became insolvent. It is objected, that the assignment is not of all the property of the assignor; but an inspection of the instrument will satisfy the court that it is full and sufficient for the purpose of enabling the trustees to carry its purposes into effect, by selling the whole estate of the assignor. If the trustees did not accept of the assignment, and no action took place under it, the objection to the claims of the United States under it may not be valid; but still the assignment is evidence of the insolvency of Mr. Brent; and the fact of his insolvency being thus established, to give, from the period of its execution, a right of the United States to be paid the debt due to them; that right could not afterwards be disturbed or affected.

The right of the United States to be paid by the executors, in opposition to the claims of the bank, if not under the assignment made by their testator, exists under the provision which gives the priority in cases of the decease of persons indebted to the United States. One of the notes was not due until after the decease of Mr. Brent; and there was, therefore, at the time of his death, no more than a contingent liability for that note. He was indorser on the note of John Cook for \$400; which became due and was protested on the 19th of November 1819. The right of the United States were absolute, and was fixed before the claim by the bank existed. As indorser, up to the failure of the maker to pay, and until after demand *and protest, no debt was due by him. The maker of a note is said *602] to be a debtor from the date of the note; his debt is *debitum in presenti, solvendum in futuro*; but not so, an indorser.

The bank has no claim on the notes sued for, and in which suit a judgment, on the statute of limitations, was rendered against the bank. The obligation to pay the debt was at an end, when the judgment was given. Thus, if the bank had a lien on the stock, as they elected to sue out the notes, the lien was abandoned. While, in England, it may be different; in

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the United States, after the statute of limitations has attached, the debt is gone, and a new promise is absolutely necessary to re-create the debt.

It is not admitted, that a construction can be given to the charter of the bank which will interfere with the priority of the government. Whatever effect the provisions of the charter, giving the bank a lien on the stock of their debtors, may have, in the case of individuals, no such effect can exist as will interfere with the right of the United States to their priority. The object of the charter was not to repeal laws already established and in full force ; and, least of all, laws which are deemed essential to the fiscal operations of the government, such as those which give the government priority of claim, in cases of the insolvency or decease of their debtors. The whole of the 11th section of the charter must be taken into consideration. It empowers the directors to make regulations *conformable to law*. From these words, it may be inferred, that congress did not intend by the charter to alter any existing laws. They recognised in this provision the laws as established and in force ; and the rules and regulations of the bank were to be in harmony with them.

Hellen, for the appellees, observed, that before he proceeded to discuss the several propositions arising in the cause, it would be necessary to state, that the record provided the proof of every fact that could, on the part of the bank, be required, to charge the stock of the deceased, by virtue of the 11th clause of the act of congress, entitled an act to incorporate the Bank of Washington, passed the 15th February 1811. It is admitted by the appellants, that their testator died indebted to the bank, on the respective notes described in the statement of facts agreed upon by all the parties to both the suits set for hearing in the court below. It is admitted, that at the time of his death, Robert Brent held 659 shares of stock in the bank. That the notes were severally protested, and that due notice [*603 of their non-payment was regularly given to him in his lifetime, or to his executors, since his decease. That the notes were yet due and unpaid.

The record thus substantiating the debts due to the bank, he should respectfully submit to the consideration of the court, in support of the decree rendered in favor of the bank by the circuit court, the following propositions : 1. That the 11th clause of the charter of the bank, which required "that all debts actually due and payable to the bank (days of grace for payment being passed), by a stockholder requesting a transfer, must be satisfied, before such transfer shall be made, unless the president and directors shall direct to the contrary,"—gives the bank a lien on the stock held by Robert Brent at the time of his death. 2. That the act of 1799, which directs "that in all cases of insolvency ; or where an estate in the hands of executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States shall be first satisfied,"—gives to the United States a simple priority of payment, and no lien ; and that it cannot divest the bank's lien. 3. That even if the United States have a priority of payment, by the act of 1799, the charter of the bank affects it ; there being in the charter no exception in favor of the United States. 4. That this stock never has been an estate in the hands of the executors, but as incumbered with the lien.

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5. That the deed of Robert Brent, in favor of the assignees, never was accepted by them; and it is, therefor, void. 6. That the stock can only be transferred as the charter directs. 7. That the statute of limitations cannot discharge the lien.

Mr. Hellen remarked, that the first proposition was so obvious, that he would even pass it by without comment, were it not necessary to fix a precise idea of the extent of the rights of the bank, as provided by the clause of the charter. The clause is itself imperative. The words "all debts actually due and payable to the bank, must be satisfied, before such transfer shall be made (days of grace being passed)," are "absolute, explicit and peremptory;" and show that no discretion is given: and when that is the case, even affirmative words make a statute imperative.

The fundamental rule for expounding statutes is, "that if it can be prevented, no clause, sentence or word should be deemed *superfluous, ^{*604]} void or insignificant." To say, then, that the stock can be transferred, before the debts of the stockholder are satisfied, is to render every word inoperative, insignificant and entirely nugatory. The right of the bank to be first paid, before the stock can be transferred, must be wholly annihilated, before the United States can, by the legal fiction, have it vested in the executors, at the death of their testator, so as to make it an estate in their hands, to authorize a priority of payment to the government. This makes it a conflict between a right secured by the charter, and a legal fiction. The doctrine of relation cannot, however, divest any right legally vested in another; as, where rent was due to landlord, who died, and execution was levied on the tenant's goods, before letters granted, on a notice by administrator to the sheriff, to pay him a year's rent, agreeable to the statute of 8 Anne, c. 17, the court held, that relations which are but legal fictions of law, should never divest any right legally vested in another. 1 Williams on Executors 398. He should show hereafter, when he undertook to discuss the fourth proposition, that the Maryland statute placed an executor on the same footing as an administrator by the common law; and at this time, merely asked the court to apply this doctrine of relation to the note of \$400, which fell due after the death of Robert Brent. That note fell due on the 19th of November 1819; Robert Brent died on the 7th September 1819, and letters testamentary were not granted until 1820. So that the note having fallen due, before the executors had a right to demand of the bank a transfer of the stock, which right only accrued to them by virtue of the letters testamentary, this legal fiction cannot divest the right of the bank (which was perfected when the note fell due) to be satisfied, before they could enforce a transfer of the stock. He also stated, that all the shares were bound for the payment of the note due on the 22d May 1819; and that alone operated to destroy the common-law right, by which an estate vests in the executor, as the death of the testator. Suppose, instead of stock, it was a movable chattel of the testator's, in the bank, which the charter provided should not be assigned, or delivered up, before the notes were satisfied." How could an executor, by virtue of this constructive right to the property, proceed to enforce that right? Thus test the extent of his powers. He could not maintain an action of trover, because there would be no illegal conversion. Replevin would not lie, because there would be no tortious taking of the property. Detinue

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*would not aid him, because he has no right to the immediate possession ; for, in the language of the charter, the debt must be satisfied, before a transfer shall be made. It cannot be contended, that the death of a stockholder changes the rights of his representatives. Executors stand in the place of their deceased, and are bound by his covenants, although not named in the deed. His act has the same effect. They take subject to the rights of the bank, as secured by the charter. In *Wilkinson v. Leland*, 2 Pet. 658, it is expressly ruled, "that where an heir takes real estate, his title is incumbered with all the liens, created by the party or the law, at his decease." This court, in the case of the *Union Bank of Georgetown v. Laird*, 2 Wheat. 390, decided, that the charter of the bank conferred a lien on the stock.

Having thus, by authorities of the most commanding character, clearly established the lien, he should proceed, with a full conviction of the magnitude of the subject, to invite the attention of the court to the important principle involved in the examination of his second proposition. Can the priority of the United States, by the act of 1799, divest a lien? In stating the question in this form, he suggested, that it permitted the United States, very improperly, to advance a move in the game. The true question is not, whether the acts of congress can divest a lien, by virtue of the priority ; as, whether a debtor on whose property a lien has attached, can by his conveyance, assignment or death, divest that lien? By the acts of congress, an estate is to be "in the hands of executors or assignees," before the priority of the government accrues. This arises, in the one case, by the act of God, which, when it happens, never defeats vested rights. The other depends on the act and deed of the debtor. He must convey, and the priority of the United States is dependent on that conveyance. If a debtor can, by his own deed or grant to assignees, defeat a prior lien, this he can effect by any *bond fide* alienation. A marriage settlement or contract will accomplish it. If it can be done by an insolvent debtor, the solvent debtor, by a conveyance, can also discharge pre-existing liens. If a debtor, by his conveyance, can discharge a lien, he can discharge any and every lien, such as the parties create by contract ; such as arise by operation of the law ; such as are created by statutes. Suppose, then, that these statutes gave to the United States, not a simple privilege, but a lien on the property of their debtors. Could *it be contended, that the conveyance of the debtor, [*606 in the one case, would defeat the lien, or that his death, in the other, where there were judgment-creditors, would entitle them to a preference in payment out of the very property which was incumbered with the liens. If this be the law, is demonstrates that what you call a lien "is an unreal mockery," a nondescript, unsubstantial, and over which the creditor has no controlling interest. This, however, is not so. Such a position is exploded by the *argumentum ad absurdum*. If it could be sustained, it would expose all legislative or statutory liens to the charge of the most inefficient and fatuous folly.

But suppose, a contract provides, in its very terms, that the creditor shall have a lien on a chattel, and congress should pass an act displacing the lien of the creditor. This would be a law impairing the obligation of a contract, and consequently void. Now, if it cannot be impaired by direct legislation, it cannot be done indirectly. The tenth section of the first

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article of the constitution of the United States, prevents the states from passing a law impairing the obligation of a contract. Congress has no power to pass such a law. No such power is delegated to congress ; and the tenth amendment to the constitution, reserves to the people the powers not delegated to congress.

He would now refer to adjudicated principles ; and inasmuch as he should refer to English cases, he would first advert to the laws of the crown, as this regarded the debts of the subject. In *Ram on Assets* 10, we find, that by the statutes of 33 Hen. VIII., c. 39, and 13 Eliz., c. 4, the crown has a lien on personal property, from the date of the writ or bond ; on real estate, the moment the subject takes office. The laws of this country are different ; but the fallacy of the notion that a priority of payment, which is not a lien, can divest a lien, flows immediately by taking the converse principle. In *United States v. Fisher*, 2 Cranch 358, this court decided, that these laws did not confer a lien on the debtor's goods ; and the reason apparently assigned for it is, "that no transfer of property in the ordinary course of business was overreached." Suppose, then, that these laws of congress, as the English statutes do, declared it to be a lien ; would it not "overreach a *bond fide* transfer of property, in the ordinary way of business." If it could not, the consequence is, that it confers no security at all, if the goods be not thereby bound. The same reasoning will apply to the case of the *United States v. Hoe*, 3 Cranch 73. The next case to which he would invoke the consideration of the court, was that of *Conrad v. Atlantic Insurance Company*, 1 Pet. 441, 444. What is [607] there asserted as to this priority of the United States ? "Why, that it is obvious, that the priority of the United States cannot divest a lien, because it is not equivalent to a lien." In that case, it is also remarked, that the authority of *Nathan v. Giles*, 5 Taunt. 578, would require very grave consideration, before any such principle should be sanctioned, as that this priority of the United States can divest a lien. This is it. "When a factor had a lien on a cargo, which was attached by the creditor, the court directed the proceeds of sale to be paid to the factor."

But in England, the king's prerogative has never been sufficiently strong to divest a lien, greatly as it exceeds this comparatively feeble power of priority, given by these acts to the United States. In *Rex v. Lee*, 6 Price 369, where a factor had a lien on goods, and they were seized by an extent in favor of the crown, against the principal, the court ordered the proceeds of the sale to be applied in discharge of the lien. Suppose, that the principal had died, could it be pretended, that this thereby defeated the lien, so as to give the crown a right to the proceeds, when the lien or right to it still existed ? *Rorke v. Dayrell*, 4 T. R. 402, also decides, "that where goods are seized on a *fieri facias*, as the king's debtor's, and before they are sold, an extent comes, at the king's suit, grounded on a bond debt, tested after delivery of the *fieri facias*, the extent cannot affect those goods." The case of *Thelusson v. Smith*, presents a very simple question. A junior-judgment-creditor seizes land which was bound by a prior judgment ; and the senior creditor, instead of enforcing payment, by levying on the land in the possession of the purchaser, tries to have the proceeds of the sale applied to the payment of his senior judgment. This he had no right to do, but instead of the sale of the land divesting his lien, it was still liable ; and by

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issuing a *scire facias* against the purchaser, so as to put his judgment in a condition for execution, that lien could be enforced.

In order to show that the death of the party could not defeat the lien-creditor's rights, so as to vest the estate in the hands of executors, discharged of the lien, he cited, *Bolton v. Tate*, 1 Swanst. 84; also, Montague on Lien 61, who states, "that solicitor of plaintiff, who dies, has a lien upon the sum decreed, in preference to bond creditors." In *Hammonds v. Barclay*, 2 East 227, it was argued, that the death of a debtor annulled the lien, by revoking the authority. The court said, "such a position was inconsistent with the justice of the case."

*If this argument should be sanctioned as the law of the land, he [*608 besought the court to consider the dreadful consequences which would ensue from such a principle. A ship-owner has a lien on the cargo for freight. He makes his voyage, that is to say, he is in sight of land; and before his arrival in port, the owner of the cargo dies. His estate is insolvent, and the consequence is, that his lien is utterly defeated. So also, the hardy tar, who perils the danger of the sea, is to go unpaid, after making, probably, a voyage to the distant Indies. But specification is useless. This deleterious and shameful perversion of justice can be confined to no order. It will inflict ruin upon the adventurous mariner, the enterprising merchant, the careful and industrious mechanic; and before the jurisprudence of the country should be stained with so odious a principle, it was right that it should receive the grave consideration of this court.

Should the court be even disposed to sanction the principles contended for by the appellant; yet the record in this case furnished no evidence of any one fact which could sustain the claim of the government. It has been already settled by this court, that "on an appeal, the court can only take notice of matters of fact appearing upon the record." *Governor of Georgia v. Madrazo*, 1 Pet. 110; 5 Ibid. 248. There is no proof on the record, that Robert Brent died indebted to the United States. No bond or transcript of his account is certified in due form, by the proper officers of the government. There is no proof of his having committed a legal insolvency. There is no proof on the record, that his estate in the hands of his executors is insufficient to pay his debts. The answer does not admit it. No account of assets—no schedule of his debts, establishes the fact. There is no proof that he held the stock, when he made the deed. The appellants admit, that the trustees did not accept the deed; and that at the time of its execution, Robert Brent owned a large estate in fee-simple. This admits the deed to be void; and if it were not, by the decision in the *United States v. Hooe*, p. 73, it must convey all his property, to give a priority. In this deed there are no words of inheritance; and, of course, it cannot vest an estate in fee-simple. Robert Brent made a will; and that is sufficient to show that the deed did not include all his estate; so that the appellant has no proof to authorize a reversal of the decree. The priority cannot affect the lien of the appellees, because the charter contains no exception in favor of the United States. It is also matter of subsequent creation to the act of 1799.

*It is admitted, that the king of Great Britain, by virtue of his prerogative, is not affected by either of these objections. He is not [*609 bound by any act, unless named. He should, however, insist, that before

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the United States can claim the benefit of this prerogative, they must introduce it into the system of the body politic, by a legislative act. Until the legislative power of the government, in a lawful way, by a positive statute, asserts a claim to this prerogative, it continued a dormant, inoperative and powerless right, inherent in the constitution, but to be born of congress, before it can be nursed by the judiciary, or even be considered as a vigorous, practical and active principle. The judiciary is constituted for the express object of expounding the laws of the country. A law then must be emanating with the legislature, before the functions of the judiciary can commence.

Should this distinction be not carefully observed by each co-ordinate branch of the government, which it was the great object of the framers of the constitution to provide, in separating their powers, and allotting to each its distinct duties ; then the rights of the legislative department are disregarded. Blackstone on the King's Prerogative, vol. 1, p. 240, observes, that " it was customary, in the early history of England, for the king to sit as a judge, to expound the laws in his own courts." This alone accounts for the manner in which the prerogative of the king has been cherished by judicial authority. To illustrate, however, the precise import of this principle, he would take the prerogative, which gave priority in payment to the king. Suppose, that congress had never legislated on this subject. It is admitted, that the power to make the law exists in congress. Without a law, could the attorney-general, on the death of a citizen indebted to the United States, by virtue of this prerogative, compel an executor to prefer the debt of the government ? Suppose, he should sue him, and allege a *devastavit*, because he paid judgment-creditors in preference to the debts due to the United States ; would the court allow this prerogative to operate against the executor ? The king has also the right to erect beacons, light-houses, &c. He can take the money from the public treasury to make the erection. In this country, congress possesses such power. They can, by statutory enactments, authorize their erection. But neither the executive nor the judiciary can claim the prerogative. If this be not so, then the social fabric, the constitution of the country, is placed upon no solid basis of delegated powers. He [610] admitted, *that the common law had been received in civil cases as a part of the jurisprudence of the United States, where it did not conflict with the fundamental principles of its republican form of government. This prerogative of the king is an exception to the general principle of the common law. " By the word prerogative, we usually understand, that special pre-eminence which the king hath over and above all other persons, out of the ordinary course of the common law, in right of his regal dignity." 1 Bl. Com. 240.

But this charter is a contract, a grant, a franchise. All its rights are beyond the reach of the government. He would not stop to apply this principle ; but would refer to the case of the *Dartmouth College*, 4 Wheat. 158. He would say, however, that congress gave the bank a right to hold the stock until the debt was paid ; and this right was valuable to the institution. This stock is not assets in the hands of executors ; " where a testator pledges goods, they are not assets until redeemed." Williams on Executors 1015. By the act of Maryland of 1798, c. 101, sub. c. 3, " an executor or executrix named in a will, cannot dispose of the chattels, or interfere therewith, until letters issue ; he must give bond within twenty days ; the court

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must direct a sale. By this modification he stands as an administrator at common law, and had no right to ask a transfer, before letters issued.

As to the fifth and sixth points, the attorney-general admitted the deed to be inoperative, the trustees not having accepted it. As to limitations, it goes to the remedy, and does not affect the debt. He cited Montague on Lien, app'x, 38, to show that the lien was not discharged by the statute. Indeed, the very essence of a lien was a right to retain the chattel until the debt was satisfied.

BALDWIN, Justice, delivered the opinion of the court.—Robert Brent, the testator, owned 659 shares of the capital stock of the Bank of Washington, in this district, which stood in his name on their books, at the time of his death, in September 1819; when he was indebted to the bank, \$1667 as indorser of two notes made by J. L. Washington; one of which was protested on the 19th, the other of the 22d of May preceding, and due notice thereof given. He was also indorser of a note of John Cooke due said bank, payable on the 19th of November 1819, which was also duly protested, and notice thereof given. On the 17th of May 1819, he made an assignment of all his estate, real and personal, to "secure the United States, to whom he was indebted, and all other creditors; which was recorded [*611 the same day, but never was accepted by the trustees, and became inoperative.

In 1820, the complainants, as executors, administered on the estate, when they called on the bank to allow them to transfer the stock belonging to the estate; which was refused by the bank, on the claim of a lien for the amount of the above notes, of which they demanded payment, before they would permit a transfer thereof on their books. Suits were afterwards brought by the bank against the executors, to recover the amount of the three notes; in one of which they obtained a verdict: on the two others, verdicts were obtained in favor of the executors, on the plea of the act of limitations.

In 1827, the executors filed their bill on the equity side of the circuit court, praying for decree to transfer the stock, discharged from any alleged lien of the bank for the debt due by the testator; on the ground, that being a debtor to the United States to a large amount, and his estate insufficient to pay his debts, the debt due to them ought to be first paid, pursuant to the provisions of the fifth section of the act of 1797 (1 U. S. Stat. 515); and that the debts claimed by the bank were barred by the act of limitations, and the verdict rendered for the defendants. These are the only questions in the case.

The act of congress referred to is in these words: "that where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent; or where the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all debts due from the deceased, the debt due to the United States shall be first satisfied."

It has been the uniform construction of this act, and the similar provision in the 65th section of the collection act of 1799 (1 U. S. Stat. 676), that whether in a case of insolvency, death or assignment, the property of the debtor passes to the assignee, executor or administrator; the priority of

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the United States operating, not to prevent the transmission of the property, but giving them a preference in payment out of the proceeds. *Conard v. Atlantic Insurance Company*, 1 Pet. 439. This preference is in the appropriation of the debtor's estate ; so that if, before it has attached, the debtor has conveyed or mortgaged his property, or it has been transferred in the ordinary, course of business, neither are overreached by the statutes (1 Pet. 440), and *612] it has never been decided, that it affects any lien, general or specific, *existing when the event took place which gave the United States a claim of priority. In the case of *Conard v. Atlantic Insurance Company*, above quoted, in *Conard v. Nicoll*, 4 Pet. 291, and *Conard v. Pacific Insurance Company*, 3 Ibid. 262, 279, this court considered the effect of the priority of the United States, in cases where their debtor had taken up money on *respondentia* bonds, on an agreement that the bill of lading of the goods therein mentioned, should be indorsed to the lenders as a collateral security for the loan ; that the return-cargo should be consigned to them on their account and risk, the bills of lading to be so expressed, indorsed in blank and delivered to them, and the property be delivered to the order of the shippers, as a continuation of the collateral security. This was held, in all these cases, to amount to a transfer of the absolute legal right to the property composing the return-cargo, to the holders of the bonds, so as to enable them to recover their value from the marshal, who had levied on them by virtue of an execution at the suit of the United States, and detained them after a demand of delivery. They recovered damages commensurate with their legal right of property ; and the court would not inquire whether, in any event, the lenders on *respondentia* could be considered as trustees for the borrower, his creditors or assigns ; deeming it immaterial. 6 Pet. 272.

Another rule is settled by these cases ; that the priority does not attach to property legally transferred to a creditor on *respondentia*, though he may hold it subject to an account, equity or trust for the borrower. Such transfer will be protected against the United States; though not an out and out sale in the course of business, so as to divest the equitable as well as the legal interest of the party. Such a transaction approximates to one which merely gives a lien ; its object is security, not a sale ; it is, in law, a sale, by the shape of the contract and securities; but if the goods were of greater value than the debt due, equity would compel an account for the surplus, considering the whole transaction to have been one of loan and priority merely. On the other hand, if the borrower, his creditor or assignee, should come into equity, to ask such account, it would be decreed to him only after the payment of the debt due ; the holder of the security would be allowed to retain it for such purpose, however defective it might be at law. Nor would a court of equity take from the lender any legal right, which he *613] might have to the possession of the *property, or to prevent its transfer to another, whereby such right would be impaired, if his conduct had been *bond fide*.

Whatever may be the defects in the rights of a *bond fide* creditor at law, equity will protect him in their enjoyment, till they are lost at law ; if his conscience is not so affected as to bring him within the jurisdiction of a court of conscience, which does not administer legal remedies for legal rights. Its action is on equitable rights, by equitable remedies ; or legal rights for which the law provides no remedy (3 Pet. 447), or none so ade-

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quate as equity, so beneficial or complete. 9 Wheat. 845. This is a case of that description, or the plaintiffs have no standing in equity; for if they have a complete legal right to priority of payment out of the stock of Mr. Brent, and a remedy to enforce it, plain, adequate and complete at law, the sixteenth section of the judiciary act (1 U. S. Stat. 82), is a proviso on the jurisdiction of a court of equity; and it is not a case in equity, under the third article of the constitution.

In the bill of the complainants, they do not contest the lien of the bank, by any paramount right in themselves as executors; they are the mere conduits through whom the United States claim the benefit of the legal priority given them by law; which the executors are compelled to assert, in order to save themselves from the consequences of their paying any other debt than that due to the United States, before it is satisfied, as prescribed by the 65th section of the collection act.

If Mr. Brent was such a debtor as is contemplated by the law, and died without property sufficient to pay his debts, the right to satisfaction out of his estate, in preference to any other creditors, is undoubtedly in the United States. The record does not contain any evidence of insolvency; but as the case has been argued, on the assumption that it existed, and that Mr. Brent was a debtor, within the purview of the law, the court will so consider him and his estate. Assuming, then, the right of the United States, as respects the executors, and all his creditors, except the bank, to priority of payment, to be complete; we find them, through the executors, plaintiffs in equity, claiming a decree for the transfer of the stock of the testator standing on the books of the bank, in order to have it sold for the exclusive payment of their debt. A court of law cannot do this; for by the 11th section of the bank charter, the stock is transferable only on the books of the bank, according to such rules as may, conformable to law, be established in that behalf, by the president and *directors. (2 U. S. Stat. 627.) On a similar provision in the charter of the Union Bank of Georgetown, [*614 this court, in the *Union Bank v. Laird*, declared, that "no person could acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank." 2 Pet. 393. The executors cannot sustain a suit at law, in their own right, for refusing to permit such transfer; inasmuch as, by another clause of the same article in the charter, it is provided: "but all debts actually due and payable to the bank (days of grace for payment being past), by a stockholder requesting a transfer, must be satisfied, before such transfer shall be made, unless the president and directors shall direct to the contrary." As Mr. Brent owed the debts now claimed by the bank, on the notes due and protested before his death, this would be a complete answer to a suit at law by his executors, for not permitting a transfer; and the same objection would be fatal to a suit in their name, for the use of the United States. The defence is a legal one; the case provided for by the charter and by law had happened; the bank had a perfect right to hold on to the stock; and this court has decided in the case of *Laird*, that a rule of the bank imposing such a restriction on the transfer of stock, is conformable to law. 2 Wheat. 392-3.

The United States have no pretence of a legal right to a transfer of the stock to themselves, or to recover damages for refusing it; the right to hold the stock devolves on the executors, to whose hands it must come, for sale

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and distribution ; the proceeds, not the stock, go to the United States in virtue of their priority ; such are the words of the law—"the estate of any deceased debtor, in the hands of executors or administrators." Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking, in the administration of the law of equity, relief, to give which, courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This court, in *Mitchell v. United States*, 9 Pet. 743, have recognised the principle of the common law, that though the law gives the king a better or more convenient remedy, he has no better right in court, than the subject through whom the property claimed comes to his hands. 2 Inst. 573 ; 2 Ves. sen. 296-7 ; Hardr. 60, 460. This principle is also carried into all the statutes, by which the appropriate courts are authorized to decide, and under which they do decide, on the rights of a subject in the controversy with the king, according to equity and good conscience between subject and subject. 7 Co. 19 b ; Hardr. 27, 170, 230, 502 ; 4 Inst. 190.

*It is not difficult, in this case, to decide what the rules of equity [615] and good conscience require. The bank have lent their money on the name, credit and stock of Mr. Brent, before the United States could have any claim of preference. Two notes were due, protested, and the legal lien of the bank for their payment complete ; as to the third, the time for payment had not arrived, before such right attached on the property of Mr. Brent in the hands of his executors ; but it was confined to what belonged to, and was part of, the assets of the estate. The right was a legal one ; the claim of the United States was a statutory one ; but its existence was not founded on any bad faith of the bank ; its conscience was unaffected, and by law they held the legal control of the transfer of their stock ; their consent was necessary to the transmission of the legal title to the executors ; and the only ground on which the aid of a court of equity is asked to compel them to give their consent, is a legal claim to the proceeds, by a right which will deprive the bank of all security for their debt. In good conscience, there can be no claim more equitable than that of the bank for money lent ; and if the law has placed them on the *tabula in naufragio*, it little comports with the principles of equity, to take it from them, merely because, by the death of Mr. Brent, before the protest of the third note, the legal lien, secured by their charter, had not become consummated, before the legal right of the United States had attached to priority of payment out of his estate. An individual asserting such a claim in equity against the bank, in virtue of an act of bankruptcy, an execution, or assignment between the date and the protest of the note, would be compelled to do equity, before he could enforce his legal right ; and we can perceive no reason why the United States should be exempted from this fundamental rule of equity, subject to which, its courts administer their remedy.

Every stockholder who makes or indorses a note to procure a loan from the bank, is bound to know the terms of the charter and by-laws ; his signature to the note is an inchoate pledge of his stock for security ; his stock gives credit to his name, and the bank grants the loan on its faith. Though the charter has not made the note a lien on the stock, till the note is protested, so as to give the bank both a legal and equitable right to refuse the transfer till it is paid ; yet it has given them the power to prevent a trans-

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fer on their books, unless by such rules as they may prescribe ; which gives them power to prevent the legal *title from passing to a purchaser. Connecting this with the power to make by-laws for the government of the bank and the management of their concerns, the bank would have a strong case in equity, had the latter clause in the 11th section of their charter been omitted.¹

Under the usual clause in the charter to the Hudson Bay Company to make by-laws, &c., they had made one respecting the transfer of their stock, so that it should be first liable for debts due to the company by their own members, or to answer the calls of the company on their stock. One of the stockholders, indebted to the company for money received for their use, became bankrupt ; his assignees brought a bill to compel a transfer of his stock, which was opposed by the company in virtue of their by-laws. The chancellor declared "the by-law a good one ; for the legal interest of all the stock is in the company, who are trustees for the several members, and may order that the dividends to be made, shall be under particular restrictions or terms ; and by the same reason that this by-law is objected to, the common by-laws of companies, to deduct the calls out of the stocks of the members refusing to pay their calls, may be said to be void." *Child v. Hudson Bay Co.*, 2 P. Wms. 207, 209 ; s. p. 1 Str. 645 ; 1 Eq. Cas. Abr. 9, pl. 8 ; 19 Ves. 428-9.

In *Waln's Assignees v. Bank of North America*, it was held by the supreme court of Pennsylvania, that when, by the known usage of a bank, the stock of a debtor was not transferable till the debt was paid, such usage was binding on his assignees ; the bank having, by their charter, power to make by-laws, and having made one requiring all transfers to be made on their books, in the presence of its officers. 8 S. & R. 73, 86. In giving such power by charter, and executing it by such a by-law, the intention of the law of incorporation is, most evidently, to give a security to the bank ; by permitting a transfer and giving a certificate to the holder, the bank give up all claims on the stock ; the legal right to supervise the transfer was intended for their benefit. On this principle, this court say, " no person, therefore, can acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank ; and if any person takes an equitable assignment, it must be subject to the rights of the bank under the act of incorporation, of which he is bound to take notice." 2 Wheat. 393.

The principle of these cases covers the present in all its bearings. It is admitted, that the bank have a legal right to withhold the *transfer, till payment of the notes protested in the lifetime of Mr. Brent ; the [*617] case is equally clear in equity as to the note indorsed by him and discounted by the bank, though not protested till after his death. A commission of bankruptcy relates to the act of bankruptcy, having the effect of an execution ; it prevents the transmission of the bankrupt's property, from that time, to any but his assignees ; the same effect follows a voluntary assignment ; both operate to transfer the property itself ; whereas, the priority of the United States attaches only after the transfer is made by the party, or by

¹ See *Knight v. Bank of Providence*, 8 Cliff. 429; *Ex parte Dunkerson*, 4 Biss. 227; *Ex parte Morrison*, 10 Bank. Reg. 105; *Ex parte Bachman*, 12 Id. 223; *Pendergast v. Bank of Stockton*, 2 Sawyer 108.

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operation of law, at his death. If, then, the lien of a corporation attaches to an actual transfer of the stock, so as to make it subject to all their equitable demands upon it; *d'fortiori*, it must remain on it, when a preferred creditor can claim payment only out of the proceeds in the hands of the assignees, or personal representatives of the debtor. So long, then, as this note remains due and unpaid, the complainants are not entitled to a transfer of the stock owned by their testator.

But they allege, that the debt is extinguished by the verdict in their favor, rendered on a plea of the statute of limitations. In the *Bank of the United States v. Donnally*, 8 Pet. 361, this court laid it down as an established principle, that the act of limitations operated only to bar the remedy, not to extinguish the right or cause of action; and that a judgment on a plea of the statute was only to bar the remedy on a contract, when sued for in Virginia, as the limitation act of that state embraced the one declared on; but did not operate to extinguish the contract, when sued for elsewhere, or in Kentucky, where by the *lex loci* it was not affected by any limitation. *Ibid.* 370. We cannot take this case out of this established rule: the legal remedy is barred, but the debt remain as an unextinguished right; and the bank, when called into a court of equity, may hold to any equitable lien, or other means in their hands, till it is discharged. The decree of the circuit court is affirmed.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is decreed and ordered by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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***UNITED STATES v. JOSEPH GARDNER.**

Counterfeiting.

Indictment for forging a silver coin of Spain, called a head pistareen, which the indictment alleged was, by law, made current in the United States: *Held*, that the head pistareen is no part of the Spanish milled dollar; that such pistareen or piece of coin is not a silver coin of Spain, made current by law in the United States.

CERTIFICATE of Division from the Circuit Court of New Jersey. At October term 1835, the defendant was indicted in the circuit court, for that he, "Joseph Gardner, late of the township of Bloomfield, in the county of Essex, and in the district of New Jersey, on the 15th day of June, in the year of our Lord 1835, with force and arms, &c., at the township of Bloomfield, in the county of Essex, in the district of New Jersey aforesaid, and within the jurisdiction of this court, did falsely and feloniously make, forge and counterfeit one hundred pieces of false and counterfeit coin, each piece thereof in the resemblance and similitude of a foreign silver coin, to wit, a silver coin of Spain, called a head pistareen, which by law was then, and still is, made current in the United States of America; against the form of the statute of the United States of America in such case made and provided." The second count in the indictment charged, that the defendant "did feloniously and willingly aid and assist in falsely and feloniously mak-

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ing, forging and counterfeiting one hundred pieces of false and counterfeit coin, each piece thereof in the resemblance and similitude of a foreign silver coin, to wit, a silver coin of Spain, called a head pistareen, which by law was then, and still is, made current in the United States of America; against the form of the statute of the United States of America in such case made and provided."

The jury found the following special verdict: "That the said defendant, Joseph Gardner, did make, forge and counterfeit four pieces of false and counterfeit coin, each piece thereof in the resemblance and similitude of a foreign silver coin, to wit, a silver coin of Spain, called a head pistareen, in manner and form as stated in the said indictment. That genuine coin of the description of the said head *pistareen has, for many years last past, [*619 been in common circulation in the country; that the same has commonly passed at the rate of twenty cents each; that few of them are now in circulation; that they are still received and paid at the said rate of 20 cents each; that they have been sometimes sold at the rate of 22 cents each. That their average value by weight is between 22½ cents, and 22½ cents each; that their average value by assays at the mint of the United States is 19 cents 7 mills each. That the said genuine coin called head pistareens, have on their face the same characters as one class or kind of the Spanish dollar and half dollar, excepting the letter and figure 2 R, on said pistareens, 4 R, on the said half dollars, and 8 R, on the said dollar, and thus purport to be quarters of said dollar. That said dollar is of the weight of seventeen pennyweights and seven grains, and the said half dollar is the one-half of the weight of said dollar. That the said dollar is of the weight required by law; is a Spanish coin, genuine and milled, and passes current as a dollar. That the said half dollar is commonly circulated at the rate of 50 cents each; and that the said false and counterfeit pieces of coin made by the said defendant, with the said dollar and half dollar, with other Spanish coin given in evidence to the said jury, are now presented to the said court as a part of this their finding. But whether or not, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the said Joseph Gardner is guilty in manner and form as he stands charged in the said indictment, the jury are altogether ignorant, and therefore they pray the advice of the said court. And if, upon the whole matter aforesaid, it shall seem to the said court, that the said Joseph Gardner is guilty in manner and form as he stands charged in said indictment, then the jurors aforesaid, upon their oath aforesaid, say, that the said Joseph Gardner is guilty thereof in manner and form as he stands charged. But if, upon the whole matter aforesaid, it shall seem to the said court, that the said Joseph Gardner is not guilty in manner and form as he stands charged in said indictment, then the jurors aforesaid, upon their oath aforesaid, say, that the said Joseph Gardner is not guilty in manner and form as he stands charged in the said indictment."

The judges of the circuit court were opposed in opinion on the following question, involved in this special verdict: 1. Whether the head pistareen, so called, is a part of a Spanish milled dollar? *2. Whether such pistareen, or piece of coin, is a silver coin of Spain, made current by law [*620 in the United States? These questions were, at the request of the district attorney of the United States, stated under the direction of the judges afore-

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said, and ordered by the court to be certified, under the seal of the court, to the supreme court of the United States, at their next session to be held thereafter, to be finally decided by the said supreme court ; and the court being further of opinion, that further proceedings could not be had in said cause, without prejudice to the merits of the same cause, did order that all further proceedings on the said indictment be stayed, until the decision of the supreme court shall be remitted to the said circuit court, and then entered of record.

The case was argued by *Butler*, Attorney-General, for the United States ; and by *Southard*, for the defendant.

THOMPSON, Justice, delivered the opinion of the court.—This case comes up from the circuit court of the United States for the district of New Jersey on a certificate of division of opinion in the court. The prisoner was indicted for falsely making and forging one hundred pieces of false and counterfeit coin, each piece in the resemblance and similitude of a foreign silver coin, to wit, a silver coin of Spain, called a head pistareen, which by law is made current in the United States of America, against the form of the statute in such case made and provided. This indictment is founded on the 20th section of the act of congress of 1825 (4 U. S. Stat. 121), which makes it felony, punishable by fine and imprisonment at hard labor, to forge and counterfeit any coin in the resemblance or similitude of any foreign gold or silver coin which, by law, now is, or hereafter may be, made current in the United States. Upon the trial of the prisoner, the jury found a special verdict. And the judges were opposed in opinion upon the following questions arising on the special verdict : 1. Whether the head pistareen, so called, is a part of a Spanish milled dollar ? 2. Whether such pistareen, or piece of coin, is a silver coin of Spain made current by law in the United States ? And these questions have been certified to this court for decision.

That the coin commonly called a head pistareen may be a part of a dollar, in reference to its divisibility only, and when understood in the same ^{*621]} sense as any other subdivision of a Spanish dollar, may be admitted, without affecting the main question in this case ; if such part has not been made current by law. But it is presumed, that this first question is to be taken in reference to the offence charged in the indictment, and the facts found by the special verdict ; and with this understanding of it, the two questions may be considered together, and involve the same inquiry, viz., whether such pistareen is a silver coin of Spain, made current by law in the United States. Such is the description of foreign coin, the counterfeiting of which, the law has declared to be a felony. The special verdict finds, that genuine coin of the description of the head pistareen has, for many years last past, been in common circulation in the country, and has generally passed at the rate of 20 cents each ; that few of them are now in circulation ; that they are still received and paid at the rate of 20 cents each ; that their average value by weight is between $22\frac{1}{4}$ cents, and $22\frac{3}{4}$ cents each ; that their average value by assays at the mint of the United States is 19 cents 7 mills each. The jury present with their verdict certain silver coin of different denominations, with the following description and remarks. “That the genuine coin called head pistareens have on their face the same character as one class or kind of the Spanish dollar and half dollar ; except-

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ing the letter and figure 2 R, on said pistareens, 4 R, on the said half dollars, and 8 R, on the said dollar, and thus purport to be quarters of said dollars. That said dollar is of the weight of seventeen pennyweights and seven grains ; and that said half dollar is the one-half of the weight of said dollar. That the said dollar is of the weight required by law, is a Spanish coin, genuine and milled, and passes current as a dollar.

Thus it will be seen, that the pistareen passes for 20 cents, or one fifth of a dollar, although it purports to be a quarter of a dollar, or 25 cents ; so that its current, as well as its real value is uncertain. And whether it is to be considered as a coin made current by law, is only to be ascertained by a reference to the laws of congress on this subject. By the act of 1792 § 9 (1 U. S. Stat. 248), establishing a mint and regulating the coin of the United States, the several denominations of silver coin are declared to be dollars, half dollars, quarter dollars, dimes and half dimes, and the value of each is established. The Spanish milled dollar, as the same was then in current use, was assumed as the standard. And the subdivision or parts of the dollar, according to the above denominations, are *adopted as the most convenient division of the dollar. And in the following year, 1793 [^{*622} (Ibid. 300), an act was passed, regulating foreign coin, by which, among other things, it is declared that foreign silver coin shall pass current as money within the United States, and be a legal tender for the payment of all debts and demands, at the rates therein fixed. The Spanish milled dollar at the rate of 100 cents for each dollar, the actual weight whereof shall not be less than seventeen pennyweights and seven grains ; and in proportion for the parts of a dollar. The dollar and parts of a dollar are here made current by law. What is here meant by parts of a dollar ? The parts of a dollar having been recently fixed and defined in our domestic coin, it is no more than reasonable to conclude, that the parts of a dollar here adopted in relation to foreign coin, are referrible to the same denomination in the subdivision, as established in the domestic coin. The value of the foreign dollar is fixed in cents, at 100 cents, according to the denomination at the mint ; and the same rule would apply to the parts of a dollar, when valued in cents ; and there is no denomination of siver valued at 20 cents, the value of the pistareen found by the jury. By this act, no foreign coin, issued after the 1st day of January 1792, shall be a tender, until samples thereof shall have been found, by assay at the mint of the United States, to be conformable to the respective standards required. And it is also declared by this act, that at the expiration of three years next ensuing the time when the coinage of gold and silver, agreeable to the act establishing the mint, shall commence at the mint of the United States ; all foreign gold coin and all foreign silver coin, except Spanish milled dollars, and parts of such dollars, shall cease to be a legal tender. And it would be incongruous to suppose, that these foreign coins, if not a legal tender, would be considered as made current by law. And it is also provided by this act, in order to fix the time when foreign coin should cease to be a tender, that the president shall make proclamation of the time when such coinage shall commence. The president, accordingly, on the 22d of July 1797, issued his proclamation, announcing the time when the coinage commenced at the mint, and declaring that all foreign silver, except Spanish milled dollars and parts of such dollars, will cease to pass current as money, on the 15th of October then next.

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That the policy of the government was to withdraw from circulation, or at least not to recognise as a coin made current by law, foreign coin, as soon as our own coinage was sufficient to answer the *metallic circulation, [623] is fairly to be inferred, from the provision, that all foreign gold and silver coin (except Spanish milled dollars and parts of such dollars) which shall be received in payment for moneys due to the United States, after coinage shall begin at the mint, shall, previous to their being issued in circulation, be coined anew, in conformity to the act establishing the mint. And the policy of the government being to establish a currency under our own coinage, and according to our own denominations, it is reasonable to conclude, that the parts of a Spanish milled dollar mentioned in this law, and in all the legislation on the subject, when the same language is used, is in reference to the parts of a dollar according to the division in the act of 1792. The act of 1793 was in part repealed in 1806 (2 U. S. Stat. 374), and another law regulating the currency of foreign coins passed, directing at what rate such foreign coin shall pass current, retaining the same standard of weight, seventeen pennyweights and seven grains, as the Spanish milled dollar, and in proportion for the parts of a dollar; and directing the secretary of the treasury to cause assays of the foreign gold and silver coin to be had at the mint, for the purpose of enabling congress to make such alteration in the coin made current by that act, as may become necessary, from the real standard of such foreign coin: all looking to the same policy with respect to the establishment of our own coinage, and in reference to the denominations in the law of 1792. By the act of 1806 (2 U. S. Stat. 404), for the punishment of counterfeiting the current coin of the United States, it is made felony to counterfeiting any gold or silver coins which by law now are, or hereafter shall be made current, or be in actual use and circulation as money, within the United States; clearly embracing money in circulation which was not made current by law; and in this class or description may be embraced the small silver foreign coin under 25 cents, in circulation here. By the act of 1825 § 20 (4 U. S. Stat. 121), under which the prisoner is indicted, this class of currency is omitted, and the offence is confined to counterfeiting such foreign gold or silver coin which, by law, then was, or thereafter might be, made current in the United States. The jury, by their special verdict, find, that the head pistareen has for many years past been in common circulation in the country. The counterfeiting of such coin, under the act of 1806, would be felony; but not under the act of 1825, unless it is a coin made current by law.

From this view of the several acts of congress, there is at least reasonable grounds to conclude, that when the terms, parts of [624] a dollar, are used in these laws, it is in reference to the division of a dollar, as established at the mint; and there being no such part as a twenty-cent piece, or fifth of a dollar, we think the pistareen is not a coin made current by law. But if this is a doubtful construction of the act, it ought to be adopted in a case so highly penal as the present. We are accordingly of opinion, that the question certified to this court must be answered in the negative.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of New Jersey, and

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on the questions and points on which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, it is the opinion of this court, first, that the head pistareen, so called, is no part of a Spanish milled dollar; and secondly, that such pistareen or piece of coin is not a silver coin of Spain, made current by law in the United States. Whereupon, it is ordered and adjudged by this court, that it be so certified to said circuit court.

*JOHN McLEARN and others, Aliens and subjects of the King of GREAT BRITAIN, Appellants, v. JAMES WALLACE, a citizen of the state of GEORGIA, Administrator of JAMES HENDLEY McLEARN, and ARCHIBALD McLELLAN and wife, citizens of the state of SOUTH CAROLINA. [*625]

ARCHIBALD McLELLAN and wife, citizens of the state of SOUTH CAROLINA, Complainants, v. JAMES WALLACE, a citizen of the state of GEORGIA, Administrator of JAMES HENDLEY McLEARN, deceased.

JAMES WALLACE, a citizen of the state of GEORGIA, Administrator of JAMES HENDLEY McLEARN, deceased, v. ARCHIBALD McLELLAN and wife, citizens of the state of SOUTH CAROLINA, and JOHN McLEARN and others, Aliens and subjects of the King of GREAT BRITAIN.

Marshalling of securities.

A tract of land in the state of Georgia was purchased by A. McLearn, on which he established a rice plantation, put slaves upon it, paid part of the purchase-money, gave a judgment for the balance, and died, leaving a son, James H. McLearn, his devisee; who, to obtain possession of the estate, mortgaged the land and slaves for the balance of judgment; a judgment, under the laws of Georgia, binds personal as well as real property. The son died, part of the debt being unsatisfied, leaving as his nearest of kin, aliens; and also more remote kindred, who were citizens of the United States. The real estate was sold to satisfy, and did satisfy, the mortgage; the personal estate was sold by the executor. The aliens, who were nearest of kin, claimed the proceeds of the personal estate; the kindred of the deceased, who were more remote, but who were citizens of the United States, claimed that the personal estate should have been appropriated to pay the mortgage; and that not having been so appropriated, they were entitled to the money arising from its sale, to reimburse them for the value of the real estate taken by the mortgagor, the aliens nearest of kin not being entitled, by the law of Georgia, to take real estate by descent. The court held, that as both the real and personal estate had been charged with the mortgage-debt, both funds must be applied in proportion to their respective amounts, to its payment; any debt, not covered by the mortgage, to be paid out of the personal estate; the nearest of kin to take the residue of the proceeds of the personal estate, and the remoter kin, citizens of the United States, to take the residue of the proceeds of the real estate, and the real estate unsold.

APPEAL from the Circuit Court of Georgia. *Archibald McLearn, a native of Scotland, and afterwards a citizen of the United States, [*626] purchased tract of land called Gowrie, and a small island, in Chatham county, in the state of Georgia, on which he established a rice plantation; and having paid part of the purchase money, a judgment was obtained against him for the balance. He died, having devised the whole of his estate, real and

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personal, to his son, James H. McLearn. The property of the testator consisted, chiefly, of the plantation in Chatham county, and the negroes by which it was cultivated. By the laws of Georgia, all the property of the testator, both real and personal, was bound by the judgment against Archibald McLearn.

James H. McLearn, holding under the will of his father, Archibald McLearn, the whole of his estate, thus incumbered by the judgment for the balance of the purchase-money due for the land, in order to obtain possession from the executors of the will, who insisted on keeping possession until the debts due by the testator were paid; gave to the creditor of his father his bond for the unpaid balance of the purchase-money, and executed a mortgage to secure the payment of the bond, on the land, and on the negroes belonging to the estate. He paid a part of the debt, and died without issue, and intestate; leaving a balance of the original debt for the purchase-money unpaid, and secured by the bond and mortgage. The mortgagee foreclosed the mortgage, and sold the land for \$19,739.13; thus satisfying the whole of the claims of the creditors of Archibald McLearn and James H. McLearn, for the original purchase-money of the real estate, and for the interest on the same.

James Wallace administered to the estate of James H. McLean, sold all the personal property, and after paying all the remaining debts of his intestate, there was a balance in his hands, in 1833, exceeding \$21,000; which he invested, by agreement of all interested, for the benefit of whoever might be entitled to the same.

The nearest of kin to James H. McLearn were John McLean and others, who were aliens, residing, at the time of the decease of the said James H. McLearn, in Great Britain, and were subjects of the king of that kingdom. The wife of Archibald McLellan was more remotely related in blood to the intestate, and she and her husband were citizens of the state of South Carolina, at the time of his decease; and she was the nearest of kin to him, capable of inheriting his real estate, according *to the laws of Georgia, which do not allow aliens to inherit land. As the next of kin capable of inheriting, they claimed the real estate of James H. McLearn.

John McLearn and wife, and the aliens nearest of kin to the intestate, filed a bill in the circuit court of the United States for the district of Georgia, against James Wallace, administrator of James H. McLearn, and against Archibald McLellan and wife, the remoter kindred of the intestate, citizens of South Carolina. The bill prayed that the complainants should be declared entitled to the estate, real and personal, of James Hendley McLearn; that the same should be delivered to them, and the cash in the hands of the administrator should be paid to them. The bill also prayed, that Archibald McLellan and wife should be decreed to have no interest in the real estate; and for other and farther relief.

Archibald McLellan and wife filed a bill in the same court, against John McLearn and others, the alien kindred of the intestate, and against James Wallace, his administrator. The bill prayed, that the complainants might be declared entitled to so much of the real estate of James H. McLearn, as remained unsold; that the alien kindred of the said James should be decreed to have no interest in the lands; and that the administrator should be decreed to account to them for the whole of the personal estate remain-

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ing after the payment of the debts of his intestate ; and to account to them for the amount of the sales of the land, and to pay to them the value of the said land sold, out of the proceeds of the personal estate remaining unadministered, and for other and further relief, &c.

James Wallace, the administrator of James H. McLearn, filed his bill of interpleader, claiming the protection of the court ; exhibiting an account ; and offering to deliver the unadministered part of the estate to such party as the court might adjudge to be entitled to receive it.

The circuit court decreed that Archibald McLellan and wife, as the nearest of kin to James H. McLearn, capable under the laws of the state of Georgia, of inheriting real estate (they being citizens of the United States at the time of his decease), were entitled to the whole of the real estate of which James H. McLearn died seised and possessed ; but the same having been sold, the court allowed them the money for the part sold, and all the real estate unsold ; and to John McLearn and the aliens, the court allowed the remaining part of the estate, after the payment to Archibald McLellan and wife of the sum of \$19,739.13, the amount the plantation sold for, less *the costs of suit, &c. The sum decreed to be paid to John McLearn and wife, amounted to, \$1557.35. The administrator, [*028] James Wallace, was decreed to pay those sums to the parties respectively, and to deliver the title deeds, &c. From these decrees, John McLearn and others, aliens, appealed to this court.

The case was submitted to the court, on the part of the appellants, by *Berrien*, on a printed argument, handed to the court by Mr. *White* ; and was argued at the bar, by *Preston*, for Archibald McLellan and wife.

Certificates from gentlemen of distinguished legal acquirements, and many of whom had held high judicial stations in the state of Georgia, were laid before the court, in support of the construction given by the counsel for the appellants, of the laws of Georgia ; and the application thereof, in cases of intestacy, in the courts of that state.

Berrien contended :—1. That the debts of an intestate, whether by simple contract or by specialty, are chargeable equally on his real estate and personal estate, in Georgia. The law of England, which declares the latter to be the primary fund for that purpose, and marshals the assets to enforce that liability, by the exoneration of the real estate, is not the law of Georgia. 2. Even in England, the debt for which the land was sold, under the mortgage given by James H. McLearn, having been contracted by Archibald McLearn, and being for the unpaid purchase-money of the same land ; such debt, notwithstanding the bond and mortgage given by James H. McLearn, ought, as between his representatives, to be charged on the land. 3. In the worst aspect of the case, the personal estate could only be liable to contribution. 4. In any event, the commissions on the sales of the land, cannot be charged to the personal estate.

The printed argument of Mr. Berrien was prefaced by the following “preliminary remarks.” The degrees of kindred of the respective parties are not in controversy—neither is the account of the administrator ; but there is one question, to which the attention of the court is called, before entering into the general argument ; because, if decided in favor of the

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James Wallace administered to the estate of James H. McLean, sold all the personal property, and after paying all the remaining debts of his intestate, there was a balance in his hands, in 1833, exceeding \$21,000; which he invested, by agreement of all interested, for the benefit of whoever might be entitled to the same.

The nearest of kin to James H. McLearn were John McLean and others, who were aliens, residing, at the time of the decease of the said James H. McLearn, in Great Britain, and were subjects of the king of that kingdom. The wife of Archibald McLellan was more remotely related in blood to the intestate, and she and her husband were citizens of the state of South Carolina, at the time of his decease; and she was the nearest of kin to him, capable of inheriting his real estate, according *to the laws of *627] Georgia, which do not allow aliens to inherit land. As the next of kin capable of inheriting, they claimed the real estate of James H. McLearn.

John McLearn and wife, and the aliens nearest of kin to the intestate, filed a bill in the circuit court of the United States for the district of Georgia, against James Wallace, administrator of James H. McLearn, and against Archibald McLellan and wife, the remoter kindred of the intestate, citizens of South Carolina. The bill prayed that the complainants should be declared entitled to the estate, real and personal, of James Hendley McLearn; that the same should be delivered to them, and the cash in the hands of the administrator should be paid to them. The bill also prayed, that Archibald McLellan and wife should be decreed to have no interest in the real estate; and for other and farther relief.

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Berrien contended :—1. That the debts of an intestate, whether by simple contract or by specialty, are chargeable equally on his real estate and personal estate, in Georgia. The law of England, which declares the latter to be the primary fund for that purpose, and marshals the assets to enforce that liability, by the exoneration of the real estate, is not the law of Georgia. 2. Even in England, the debt for which the land was sold, under the mortgage given by James H. McLearn, having been contracted by Archibald McLearn, and being for the unpaid purchase-money of the same land ; such debt, notwithstanding the bond and mortgage given by James H. McLearn, ought, as between his representatives, to be charged on the land. 3. In the worst aspect of the case, the personal estate could only be liable to contribution. 4. In any event, the commissions on the sales of the land, cannot be charged to the personal estate.

The printed argument of Mr. Berrien was prefaced by the following “preliminary remarks.” The degrees of kindred of the respective parties are not in controversy—neither is the account of the administrator ; but there is one question, to which the attention of the court is called, before entering into the general argument ; because, if decided in favor of the

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*complainants in the first bill, it disposes of the whole case. It is, whether those complainants, although aliens, and therefore, incapable, under the laws of Georgia, of holding the real estate specifically, are not, under those laws, entitled to its proceeds. Prince's Dig. 135, art. 15.

Although aliens are incapable of holding lands, they are entitled, by this act, to take the proceeds of real estate, as devisees or next of kin of a deceased citizen. It recites, that vexatious law-suits had been prosecuted by the escheators, against the estates of citizens, who had bequeathed their estates to persons residing in foreign parts, and provides, that their lands may be sold, and the proceeds paid over. The words of the recital are confined to persons dying testate, citizens who bequeathed their estates; but the enacting clause applies also to cases of intestacy, for it authorizes the executor or administrator to sell such real estate, and pay over the proceeds to the devisees or legal representatives of the deceased. It authorizes this, however, only where the citizen shall die, leaving no heir who can inherit the same, because of his being an alien; and the argument against which we have to contend is, that when any of the kindred of the deceased, however remote, are citizens, their claims, as to the real estate, will prevail over those of the devisees or nearest of kin, being aliens. Such is the letter of the act, the words being, "shall leave no heir, &c." *Sed qui hæret in litera, hæret in cortice.* Its manifest intention is, to remove the disability of alienage, from the next of kin, or devisee of a citizen; and these words, "shall leave no heir, &c." may, without any extravagance of version, be construed as equivalent to a provision in the following words: "shall leave next of kin or devise to persons who are incapable of taking because of their being aliens." It was the design of the legislature to permit a citizen to leave his real estate to the natural, or selected, objects of his bounty; not specifically, for that the policy of the law was supposed to forbid, but by a sale and delivery of the proceeds.

This view is confirmed by the act of 1789, which declares, that "should any case arise which is not expressly provided for by this act, respecting intestates' estates, the same shall be referred to, and determined by the common law of the land, as it hath stood, since the first settlement of this state, except only, that real and personal property shall always be considered, in respect to such distribution, as being precisely on the same footing." Now, here is a case of distribution of an intestate's estate, not expressly provided for by that act; *and according to the argument we are contesting, [630] the real and personal estate would be disposed of in a different manner. But the act itself declares, that the common law, modified by its own express provisions, shall constitute the rule. The common law inhibits an alien from holding real estate, but permits him to hold personality. This act provides, that these two species of estates shall be precisely on the same footing, in respect to distribution. How are these conflicting provisions to be reconciled? Must the disability of alienage, which the common law confines to the realty, be extended to the personal estate; or shall the privilege of holding personality, be extended to the real estate? It is only in one of these two modes, that the requirement of the act of 1789, that real and personal estate shall be, in respect to distribution, precisely on the same footing, can be complied with; unless by a liberal interpretation of the act of

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1810 (Prince 135), the claim of the alien to take the proceeds of the estate, is admitted.

1. Upon the first point, it was contended, that the course of legislation in Georgia, had been, uniformly, to put real and personal estate on the same footing, for the payment of debts, as well as for other various purposes. The doctrine of the common law of England, which gives land to the heir, and chattels to the executor or administrator, has never been recognised in the state. Both species of property pass, under the laws, directly to the executor or administrator, to be applied by him as assets in payment of debts ; or for distribution among the next of kin of equal degree. No person is known, under the laws of Georgia, as heir, in contradistinction to the distributees of a decedent, as they are identical ; unless, in such a case as this now before the court, where it is said, the disability of alienage intervenes to incapacitate the nearest of kin from taking the real estate. But in this case, the more remote kindred must sustain their claim, if it may be sustained, under the statute of distributions of Georgia ; and do not take by descent at common law. In support of these positions, he cited, Walk. Dig. 15, 29, 313, 414 ; Prince's Dig. 559, art. 180 ; Ibid. 160, art. 42.

The courts of Georgia have given effect to the provisions of the constitution and laws of Georgia, which had been cited ; and have rejected the distinction which exists, under the law of England, between the heir of the real, and distributee or representative of the personal estate ; and with it the power which is exercised by the *English courts of chancery, of marshalling the assets of a decedent's estate, as between these parties. [*631] By the laws of Georgia, lands as well as chattels may be taken in execution, and sold in precisely the same manner. The former are assets for the payment of debts in the hands of an executor or administrator, primarily, or equally with the personal estate ; and without any proceeding against the heir to render them so. That such is the law of Georgia, was recognised by this court in the case of *Telfair v. Stead's Executors*, 2 Cranch 406 ; cited also, Prince's Dig. 211-12, art. 12 ; Dawson's Dig. 218 ; Ibid. 595 ; Prince's Dig. 158, art. 29. The common and statute law of Great Britain, which were "usually in force in the province of Georgia, in May 1776," and not contrary to the constitution, laws and form of the government of the state, were declared to be in force, "until repealed, amended or otherwise altered."

It is necessary, then, that McLellan and wife, who seek to enforce what they conceive to be the English rule in this case, should show, affirmatively, that it was usually in force in Georgia, in 1776 ; and negatively, that it has not been since repealed, amended or otherwise altered ; which is believed to be impossible. The *onus* is with them. But if this were not so, it seems very clear, that our own legislation, and the decisions of our courts, will show, affirmatively, that it is not the law of Georgia. The whole course and spirit and purpose of the laws and decisions of the courts of Georgia have been in opposition to the rights which, in England, form the policy which there prevails in favor of the heir. The law of descents of Georgia is different. The right of creditors to enforce the payment of their debts is different ; and the marshalling of the assets of a decedent's estate is fixed and regulated on dissimilar principles.

2. Will the English rule, which is appealed to in behalf of McLellan and wife, sustain their pretensions ; the debt which has been paid by the sale of

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the land, having been originally contracted for the purchase of the same? Judgment for this debt was recovered against Archibald McLearn, in his lifetime; and by the law of Georgia, it bound all his property, and the plaintiff in the same could have levied for the debt on either the real or personal estate, or on both. Such was the state of things, on the death of Archibald *632] McLearn. *The judgment remained in full vigor; was an incumbrance upon his estate, and capable of being enforced against his property, real and personal, in the hands of his executors. James H. McLearn, who was the general devisee of his father Archibald, on coming of age, in order to obtain possession of the property from the executors, and on their requisition, substituted his bond and mortgage of the land and negroes devised to him by his father, and on which this judgment was an incumbrance. The only change effected by this was, to convert the general lien existing under the judgment, on all the property of Archibald McLearn, into the specific lien created by the mortgage on the property mortgaged, and to release the remaining property (which is shown, by the accounts of the administrator, to have been very small), from the lien of the judgment. Now, keeping in mind, that this was originally the debt of Archibald McLellan-contracted by him for the purchase of this very land, which is now claimed by McLellan and wife; and consequently, that it did not, as in the case of money taken up on mortgage, inure to the benefit of his personal estate; it is submitted, that even upon the principles of equity, applicable to the subject, which are recognised in the English courts of chancery, no one of the circumstances can, nor can all of them combined, throw this debt, exclusively or primarily, on the personal estate of James H. McLearn.

We are not now called upon to consider the lien which a vendor has for unpaid purchase-money, as against his vendee, or a purchaser from him. The point presented in this case, is between the kindred of the general devisee of the vendee of the land; one claiming the land purchased, the other admitted to be entitled to the personality; and both asserting their claims under the statute of distributions of Georgia. As between them, until the purchase-money is paid, it remains chargeable in equity on the land purchased. Neither is this a question, whether the general, real or personal estate shall be charged with this debt. The inquiry is more simple. It is, whether the specific land purchased, but not paid for, by Archibald McLearn, shall bear its own burden? Whether, upon any principle of equity, McLellan and wife can claim this land, under the statute of distributions of Georgia, and make the other kindred, claiming under the same statute, who have no interest in it, and neither have derived, nor can derive, any benefit from it, pay its price? Cases cited and examined, as applicable to this point: *Hughes v. Kearney*, 1 Sch. & *Lef. 132; *Pollexfen v. Moore*, 3 Atk. 236, 272; *633] *Cumberland v. Codrington*, 3 Johns. Ch. 252; *Evelyn v. Evelyn*, 2 P. Wms. 664; *Mathewson v. Hardwick*, Ibid. n.; *Billinghurst v. Walker*, 2 Bro. C. C. 604; *Basset v. Percival*, 2 P. Wms. 664 n. In concluding the argument on this point, it was submitted, that as this debt was originally contracted by Archibald McLearn, and was a lien upon his property, at the time of his death; and as James H. McLearn did not, by giving his bond and a mortgage on the same property, which was before bound, make this his own debt, so as to throw it upon his personal estate, as between the representatives of James H. McLearn, it is not a debt exclusively chargeable

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upon his personal estate, even according to the rule in the English court of chancery.

3. The third point is not presented by the appellants, as if this were a case for contribution. It is admitted, indeed, that James H. McLearn, who was the proprietor of the whole estate, had a right to charge any part, or the whole of it, with the payment of this debt; and that, in point of fact, he has so charged certain real and personal property belonging to the estate, by way of mortgage. If the claim of McLellan and wife, to be exclusively entitled to the real estate, be sustained, it will result, that real and personal property, subject, under the mortgage, to a common burden, has become vested in different persons; but it is also to be remembered, that this incumbrance was created by the purchase of the real property mortgaged; that the debt, to satisfy which this land was sold, was the unpaid balance of the purchase-money of the same land, for which the purchaser and his heirs, however indefinite the series, were but trustees to the vendor, until the purchase-money was paid.

As the court gave no opinion on the fourth point, the argument is omitted.

Preston, for the appellees.—The construction given to the law of Georgia (Prince's Digest 185, art. 15), by the counsel for the appellants, is denied. It is contended, that the proceeds of land will, under this law, go to aliens; although the real estate could not have gone to them, after the death of the owner. The law referred to by the counsel was not intended to remove the disabilities of aliens; and this is shown in the title and the *purpose of it. It is an act to explain the escheat laws. It had no view to [*634 extend or modify the rights of aliens. The act of 1810 was intended to explain the act of 1805, and to correct the abuses under it. The law is construed to extend to cases of testacy; and to put an end to the vexatious acts of the escheators, in those cases. By the laws of Georgia, as they exist, aliens cannot inherit real estate; the estate is cast, by descent, on the heritable blood. The real estate of John H. McLearn, then, descended to the appellees; and the real and personal estate should go together. As they take the real, so they ought to take both.

If this is the law of Georgia, then, the appellees, McLellan and wife, take all the property of James H. McLearn, both real and personal; and as the proceeds of the real estate have been absorbed in paying a debt due by, and which ought to have been paid out of, the personal estate, the balance in the hands of the administrator should be paid to the appellees. The circuit court has decided, that the balance of the personal estate, after paying the debt for which the real estate was sold, is to go to the nearest of kin. This is not according to the law of Georgia. In 1795, aliens were, by the laws of Georgia, allowed to hold real estate by devise; but this act was repealed in the following year. Walker's Dig. 600. Thus, the legislature, by positive enactment, declared their determination that none but citizens of the United States should hold a fee-simple estate in lands.

As to the position of the appellant's counsel, that real estate is chargeable, equally with personal estate, by the law of Georgia; this is denied. It is admitted, that the whole estate of one deceased is liable for his debts; but the primary fund is the personal property. Attempts have been made in

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that state, to make them equally liable, but they have not succeeded, so as to make them inseparable. The heir-at-law takes the real estate, and the executors take the personal property ; and after the debts are paid, it goes, if they are not aliens, to the personal representatives. The executors must pay the debts out of the personal assets ; and if any construction of the law prevails, so as to apply the real estate in equal responsibility with the personal, it is in opposition to the plain meaning of the law.

What is the fixed and settled general law of the state of Georgia, cannot be readily ascertained. It is difficult to obtain reports of the decisions of the courts, and there has been hitherto no court of errors or appeals, having *635] a general and final jurisdiction over cases which "have been decided in the courts of the state. What rights over, and what interests in, the real estate of a testator, do executors acquire under the laws of Georgia ? Prince's Digest 178. The law authorizes executors to make titles to lands which the testator, in his lifetime, contracted to sell and convey. If the executors took the lands, they could sell and convey, without such a provision, in the same manner as they may sell personal property. The law, however, imposes peculiar solemnities ; which must, in cases of sales of lands, be observed by executors. It is, therefore, apparent, that lands are not assets in the hands of an executor. By the law of 1810, it must be admitted, that real property cannot, in case of intestacy, go to an alien. Prince's Digest 156. Can the proceeds of real estate, sold after the decease of the intestate, go to such alien ? The law is clearly established, that such proceeds have all the characteristics of the realty, and are governed by the same rules, and subject to the same rights, as the real estate was.

What has an executor to do, in Georgia ? The law provides only for his care and distribution of the personal estate, and is silent as to the realty. Prince's Dig. 171. In all the states of the Union, personal property is first made applicable to the payment of debts due by a deceased person. In 2 McCord, it was held, that the English rule prevailed in South Carolina. As between creditors, this was of no moment, when they sought to enforce the payment of the debts due to them ; but as to all others, the law is different. The heir is entitled to the profits of the real estate, immediately after the death of the person last seised ; and the executor takes the personal property. This shows the difference between the rights of persons interested, and the clear distinction between them. The heir holds the land, until it is sold ; and even in the case of a will giving executors power to sell land, no title to it is given ; and the heirs continue in possession until the sale.

WAYNE, Justice, stated, that in Georgia executors never sell land for payment of debts, but by order of court. The same law prevails in Georgia as in other states.

Preston.—The common law of England is in force in Georgia, except when altered by statute ; and it certainly cannot be claimed, that at the common law such a right as that which is asserted by the appellants would prevail.

*636] As to the second point presented by the counsel for the appellees, it is contended, that no proceedings by the creditor of the estate can impair or affect the rights of the heir. The creditors cannot decide who shall suffer by his actions, the heir or the next of kin. He has a right

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to his debt; but the rights of others, after his debt is paid, are left where he found them. By what rule will the court decide, that the creditor may despoil the rights of the heir.

It is important, that the court shall look at the facts of this case, in considering the questions arising on this point. The estate of James H. McLearn was not, at the time of his death, liable for the debts of his father. He had extinguished the debt due as the purchase-money of the estate, by substituting for it his own bond and mortgage. Thus, the lien on the land, when it descended to him, was dissolved—was at an end. It was not then to enforce the principle of law, that land continues liable to the lien of unpaid purchase-money, that the land was sold by the mortgagee. This court has decided, that the equity of the vendor for purchase-money, exists only when he has taken no additional security for his debt. So, too, it is waived, by changing the security, and this is considered as waiving the equitable lien. *Brown v. Gilman*, 4 Wheat. 55; s. p. 1 Mason 191. This was done by the creditors of Archibald McLearn. They took the bond and mortgage of James H. McLearn; and they ceased to have an equitable lien on the land for any balance of the purchase-money.

The court will then sustain the decree of the circuit court, as to the proceeds of the real estate remaining in the hands of the administrator. It is also asked, that they will refuse to the appellants the portion of the proceeds of the personal estate which that court gave to them.

MCLEAN, Justice, delivered the opinion of the court.—This case is brought before this court, by an appeal from the decree of the circuit court of Georgia. From the evidence in the case, it appears, that Archibald McLearn purchased a tract of land, in the state of Georgia, on which he established a rich plantation, paid a part of the purchase-money, and suffered a judgment to be obtained against him for the balance; that he afterwards died, leaving James H. McLearn, his only son and devisee; that the property of the deceased consisted chiefly of the *rice plantation, [*637 and the slaves by which it was cultivated; and that under the laws of Georgia, personal as well as real property is bound by a judgment. That the devisee, to obtain possession of the property, gave his own bond, secured by a mortgage on the land and slaves, for the balance of the judgment; he afterwards died, leaving a part of this debt unsatisfied; and that afterwards the mortgage was foreclosed and paid by a sale of the land.

The complainants are aliens, and being nearest of kin to the deceased, claim as heirs, under the law of Georgia, the personal property; and also the proceeds of the real estate, after the mortgage shall have been paid. The defendants, McLellan and wife, who are more remotely connected with the deceased, being citizens, claim the real estate as heirs, and contend, that the debts should have been paid by a sale of the personal property; and that, as the real estate has been sold for this purpose, they insist, that the proceeds of this sale should be paid to them out of the personal property.

It appears, that after the sale of the land, on application of James Wallace, the administrator, the personal property was sold; and the moneys arising from this sale, as also a surplus, after paying the mortgage, from the sale of the real estate, remain in his hands; and which he is ready to

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pay over, as the court shall direct. The relationship of the respective parties to the deceased, as set forth in their pleadings, is not disputed.

On the part of the complainants, it is contended, that being next of kin to the deceased, under the laws of Georgia, they inherit the personal property, and are entitled to the proceeds on the sale of the lands. That the personal property goes to them, notwithstanding their alienage, is not controverted by the defendants; but they insist, that the complainants are not entitled to the proceeds of the real estate. By an act of the legislature of Georgia, entitled an act to explain and amend the escheat laws, passed the 15th of December 1810, it is provided, "that in all cases where a citizen of this state, or of the United States, shall die, or may have died, possessed of, or entitled to, any real estate, and shall have no heir who can inherit the same, because of him or her being alien; that in such case, the said real estate shall not be held or considered subject to escheat, but the executor or administrator of such deceased citizen shall and may proceed, in the manner [pointed out by law, to make sale of such real *estate, and pay over the proceeds of such sale to the devisee or devisees named in the will of such deceased citizen," &c. The preamble of this act refers only to the estates of citizens of Georgia who bequeath their property to persons residing in foreign parts; but the first section seems to refer as well to cases of intestacy, as where wills have been made.

The complainants contend, that the words in this statute, "shall leave no heir who can inherit," should be construed to mean, shall leave no heir, next of kin, or devisee, who can inherit, by reason of alienage; that then the real property shall be sold and the proceeds paid over as by the act is required. And that this construction will give effect to the intention of the legislature; which was, to remove the disability of alienage from the next of kin or devisee of a deceased citizen. It does not appear, that a construction of this statute has been given by the supreme court of Georgia; and we think the construction contended for is not authorized by the words of the statute. Where a citizen shall die, leaving no heir, must mean, not the next of kin, but an heir that may inherit the real estate under the laws of Georgia. In the present case, the wife of McLellan, though remotely connected with the deceased, is within that degree of consanguinity which may claim the inheritance under the law of descents; and of course, the land in question descended to her, and consequently, it cannot be sold under the law of escheats, for the benefit of the foreign heir.

This construction is not shaken by the act of the 23d December 1789, which provides, that, "should any case arise which is not expressly provided for by this act, respecting intestates' estates, the same shall be referred to and determined by the common law of this land, as it hath stood since the first settlement of this state; except only, that real and personal estate shall always be considered, in respect to such distribution, as being precisely on the same footing." The case under consideration is not unprovided for by the laws of the state; as the personal property goes to the next of kin, though they are foreigners, and the land descends to the domestic heir.

In the able printed argument of the complainants' counsel, it is contended, that the real estate, equally with the personal, constitutes assets in the hands of the executor or administrator; and a great number of [statutes are referred to, in order to sustain this position. *The admin-

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istrator, it is said, may sell the land, and convey it, under the sanction of the court ; and that in many cases, it is sold for the payment of debts, in preference to a disposition of the personal property. And it is stated, that in Georgia, there is no marshalling of assets, as in some other states. That the creditor may, in satisfaction of his demand, direct the personal or real estate to be sold, at his option ; and that the same option may be exercised by the defendant in execution. It is unnecessary to refer to the various statutes of the state, which have been noticed by the counsel for the complainants. They are similar to the statutes of other states, which make the real estate of deceased persons subject to sale for the payment of debts ; and, under the sanction of the court, on the application of the administrators, authorize the sale of such estate. But this does not show that, in the ordinary course of administration, the personal property is not the primary fund for the payment of debts. Indeed, from the oath of the executor or administrator, and his prescribed duty, as well as various provisions in regard to the sale of land for the payment of debts, it would seem, that the personal property, in the state of Georgia, as in, perhaps, every other state of the Union, should be exhausted, except under peculiar circumstances, before the land can be sold.

The general management of the real estate, it seems, in Georgia, during the minority of the heirs, devolves upon the executor or administrator ; and from the representations of certain gentlemen in the state, who have held high judicial stations, it appears, that the executor or administrator does exercise a very great, if not unlimited, control over the management of the deceased. It is insisted, that the real estate descends to the administrator as assets, and that he may bring an action of ejectment in his own name, to recover the possession of it.

As there are no regular reports of judicial decisions in Georgia, we can derive but little aid from the adjudication of its courts, on questions which arise under the local law. But in the view which we have taken of this case, it is of no importance to ascertain the respective liabilities of the personal and real estate of deceased persons, for the payment of debts ; nor, indeed, what may be the duties of an executor or an administrator in the settlement of an estate. These would be important, in a controversy between the representatives of the estate and its creditors. The case under consideration *does not arise from the claim of creditors, but it involves the rights of distributees ; and these rights are not affected [*640 by the ordinary course of administration, but depend upon the peculiar facts of the case.

Had the debt, for the payment of which the land was sold, been an ordinary debt existing against the estate, and the payment of which was expected to be made by the common course of administration, there could be little or no difficulty in deciding, that it should have been paid out of the personal assets ; and as it had not been so paid, to direct, as prayed for by McLellan and wife, that the payment from the real estate should be reimbursed by a sale of the personal.

At the decease of James H. McLearn, his estate, both real and personal, was incumbered by a mortgage, for the payment of which the land was sold. And this mortgage was given in discharge of a judgment which was obtained against his father, Archibald McLearn, in his lifetime, and

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which bound the real and personal property covered by the mortgage. A considerable part of this debt was incurred, it seems, by the purchase of this plantation. But the argument, that the vendor and his assignee have an equitable lien on the land for the purchase-money, seems not to be well founded. That this equitable lien exists equally in the hands of the vendor or his assignee, is a well-settled principle; but the lien was discharged by the mortgage, which added a large amount of personal property to the real estate, to secure the payment of the purchase-money. To learn the nature of the incumbrance on the estate, we must look to the mortgage and the judgment, both of which created a lien upon the whole property; and also to the debt of the vendor, for which the judgment was obtained. The lien under the mortgage was more favorable to the estate than the lien under the judgment for which it was substituted; as it gave time to the devisee, and placed the estate in his possession and under his control.

With this incumbrance, created in the manner and under the circumstances stated, did this estate, both real and personal, on the decease of James H. McLearn, descend to his heirs. The personal estate goes to the foreign heirs, and the real estate to the domestic; and this gives rise to any difficulty which exists in determining this controversy. If the whole estate descended either to the foreign or domestic *heirs, it would be an [641] ordinary case of distribution; and it could be a matter of little importance whether the mortgage were paid by a sale of real or personal property. But under the circumstances of the case, it becomes a matter of great importance to the respective claimants, out of which fund this mortgage-debt shall be paid. The payment of it out of the real or personal property, will leave but a small balance to the heirs of that fund.

The principles of this case are not changed by the sale of the property. The funds realized from the sale, in equity, partake of the same character, and are subject to the same rule as the property which they represent. It is, therefore, a matter of no importance, whether the debt has been paid out of the personal or real fund; nor, indeed, whether it has been paid at all. The court must consider the case as though the real estate were still vested in the South Carolina heirs, and the personal property in the heirs who live in Scotland. In the final decree, it will be necessary to act upon the funds, as they now exist in the hands of the administrator.

The important question must now be considered, how this mortgage-debt shall be discharged. Shall it be paid out of the real estate, or out of the personal, or out of both? That the land should not be wholly exempt from this incumbrance, is clear, by every rule of equity which applies to cases of this description. In addition to the consideration that the mortgage binds the land, the fact that a considerable part of the debt was incurred for its purchase cannot be wholly disregarded. Nor would it comport with the principles of equity, to make the whole debt a charge upon the land, to the exemption of the personal property; as the lien of the mortgage covers the personal as well as the real property, and as at least a part of the debt was contracted on other accounts than the purchase of the land. The rights of the foreign heirs, under the laws of Georgia, are to be regarded equally as those of the domestic heirs. Each have interests in the property of the deceased, which are alike entitled to the consideration and protection of a court of chancery.

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Suppose, James H. McLearn had died, leaving a will, by which he devised different tracts of lands, to different persons, capable of taking by devise, and the entire real estate was incumbered by a mortgage, or other lien, which, after the will took effect, had been paid by sale of one of the tracts of land. Could a court of chancery hesitate, in such a case, to require a contribution from the devisees, not affected *by the sale, so as to make the lien a charge upon all the land? The plainest [*642] dictates of justice would require this, whether regard be had to the rights of the devisees, or to the intention of the testator. And is not the case put, analogous to the one under consideration?

By the act of the elder McLearn, his property, both real and personal, was incumbered. The heirs, both foreign and domestic, of the younger McLearn, who take this property, take it charged with the continued incumbrance. That James McLearn had a right, and was bound to continue this charge upon his property, no one will dispute. He might have left the debt, with the consent of the creditor, if there had been no prior lien, to be discharged out of his estate, as the law authorized; and in such case, it would have been payable out of the personal estate. Or he might have made the debt a specific charge on his personal property, or on his real; but he did neither. He charged its payment, in pursuance of the judgment lien, on his property both personal and real.

This lien, as between the distributees, fixes the rule by which their rights must be decided. The domestic heirs cannot claim to receive the land, free from the lien of the mortgage, nor can the foreign heirs claim the personal property, exempt from it. In equity, it would seem, that each description of heirs should contribute to the payment of the mortgage-debt, in proportion to the fund received. This rule, while it would do justice to the parties, would give effect to the intention of the ancestor. That intention is clearly shown, by the lien created on the property, and by the rules of equity such intention must be regarded.

The decision of this case must rest upon familiar and well-established principles in equity; and these principles will be shown by a reference to adjudicated cases. In the case of *Pollexfen v. Moore*, 3 Atk. 272, it appears, Moore, in his lifetime, agreed to purchase an estate from the plaintiff for 1200*l.*, but died before he had paid the whole purchase-money. Moore, by will, after giving a legacy of 800*l.* to the defendant, his sister, devises the estate purchased, and all his personal estate, to John Kemp, and makes him his executor. The executor commits a *devastavit* on the personal estate and dies, and the estate descends upon his son and heir-at-law. Pollexfen brought his bill against the representative of the real and personal estate of Moore and Kemp, to be paid the remainder of the purchase-money. Mrs. Moore, the sister and legatee of Thomas Moore, brings her *cross-bill, and prays, if the remainder of the purchase-money should be [*643] paid to Pollexfen out of the personal estate of Moore and Kemp, that she may stand in his place, and be considered as having a lien upon the purchased estate, for her legacy of 800*l.* And the lord chancellor said, "that the estate which has descended from John Kemp, the executor of Moore, upon Bayle Kemp, comes to him liable to the same equity as it would have been against the father who has misapplied the personal estate; and in order to relieve Mrs. Moore, I will direct Pollexfen to take his satisfaction

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upon the purchased estate, because he has an equitable lien both upon the real and personal estate, and will leave this last fund open, that Mrs. Moore, who can at most be considered only as a simple-contract creditor, may have a chance of being paid out of the personal assets." This case shows, that in England, the rule which requires the personal property to be first applied in the payment of debts, is deviated from, where the justice of the case and the rights of parties interested, require it. Had the debt due to Pollexfen been directed to be paid out of the personal property, it would have left no part of that fund to pay the legacy of Mrs. Moore ; and for this reason, the debt was decreed to be paid out of the land. Now, if the mortgage-debt in the present case, shall be directed to be paid out of the personal fund, it would defeat the foreign heirs, whose claim to this property, under the law of Georgia, cannot be less strong than a bequest.

In 3 Johns. Ch. 252, it is laid down, as between the representatives of the real and personal estate, that the land is the primary fund to pay off a mortgage. And in 2 Bro. C. C. 57, Lord KENYON, as master of the rolls, laid down the same rule ; that where an estate descends, or comes to one, subject to a mortgage, although the mortgage be afterwards assigned, and the party enter into a covenant to pay the money borrowed, yet that shall not bind his personal estate. There is no doctrine better established, than that the purchase of land, subject to a mortgage-debt, does not make the debt personal ; and on the question being raised, such debt has been uniformly charged on the land. And this principle is not changed, where additional security has been given.

In the case of *Evelyn v. Evelyn*, 2 P. Wms. 659, A. mortgaged the land for 1500*l.*, and his son B. covenanted with the assignee of the mortgage, to pay the money. He succeeded to *the premises, after the ^{*644]} death of his father, and died intestate. The question was, whether his personal estate, under the covenant, should be applied in payment of the mortgage ; and it was decided, that the land should be charged, and the covenant was only considered as additional security.

In the case of *Waring v. Ward*, 7 Ves. 334, Lord ELDON says, "the principle upon which the personal estate is first liable, in general cases, is, that the contract primarily is a personal contract ; the personal estate receiving the benefit : and being primarily a personal contract, the land is bound only in aid of the personal obligation, to fulfil that personal contract." It has long been settled, therefore, that upon a loan of money, the party meaning to mortgage, in aid of the bond, covenant or simple-contract debt, if there is neither bond nor covenant, his personal estate, if he dies, must pay the debt, for the benefit of the heir. But suppose, a second descent cast ; and the question arises between the personal estate of the son, and his real estate, descended to the grandson ; then the personal estate of the son shall not pay it, as it never was the personal contract of the son. And this is the well-established rule on this subject. If the contract be personal, although a mortgage be given, the mortgage is considered in aid of the personal contract ; and on the decease of the mortgagor, his personal estate will be considered the primary fund, because the contract was personal ; but if the estate descend to the grandson of the mortgagor, then the charge would be upon the land, as the debt was not the personal debt of the immediate ancestor. And so, if the contract was in regard to the realty, the debt is a

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charge on the land. It is in this way that a court of chancery, by looking at the origin of the debt, is enabled to fix the rule between distributees.

In the case under consideration, the mortgage was given by James H. McLearn, but it was not given to secure a debt created by him. The mortgage merely changed the security, but did not affect the extent of the judgment-lien. And this judgment was obtained, chiefly, for the purchase-money of the estate. In effect, the debt for which the judgment was obtained against Archibald McLearn, and for which the mortgage was given, constituted an equitable lien on the land; and had the mortgage covered only the land, it must have been considered the primary fund. The debt for which the mortgage was given, was not the personal contract of James H. McLearn, but the contract of his ancestor in the purchase of the estate. But *if the contract was personal, and might have been a [*645 charge on the personal estate devised to James H. McLearn, yet the character of the debt, in this respect, is changed in the hands of the present heirs. In the language of Lord ELDON, this debt cannot be a charge on the personality, because it was not created by the personal contract of James H. McLearn.

This, under the authorities cited, would be the rule for the payment of the mortgage-debt, if James H. McLearn had not executed a mortgage on the personal as well as the real property, which, as devisee, he received from his father. This mortgage on the personal property cannot be considered in the light of additional surety to the lien which before existed. If it could be considered in this light, the land would still be the primary fund, and the personal mortgage as surety or auxiliary to the land. But this mortgage can in no respect be considered as additional surety. It might have been so considered, in reference to the equitable lien of the vendor for the purchase-money, as such lien was limited to the land; but the lien of the judgment obtained against the ancestor of James H. McLearn, and for which the mortgage was substituted, extended, as before remarked, to the personal as well as real estate of the defendant. The debt, then, for which the mortgage was given did not arise from the personal contract of James H. McLearn, but by the contract of his ancestor; and the mortgage was given in discharge of the judgment. This created no new lien upon the personal property. It came to James H. McLearn, under the will of his father, subject to the lien of the judgment. The mortgage then did not, and was not intended to, create any new charge upon the personality; but to continue, in a different form, that which already existed.

In this view, the charge on the personal estate can no more be disregarded, than the charge upon the real; and in this respect, this case differs from the cases referred to. The charge on both funds, under the mortgage, may be compared to a will devising the funds to the respective heirs now before the court, as the statute provides; and leaving the debt as a charge upon his real and personal property. Can any one doubt, that such a bequest would be considered by a court of chancery as a charge upon both funds? Now, although James H. McLearn has made no will, as in the supposed case, yet he gave a mortgage to continue the charge on the personal property which existed under the judgment; and the law of Georgia fixes the rule *of descent. This act of the ancestor, connected with the Georgia law of descent, gives as decided and clear a direction to [*646

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the property, both real and personal, under the mortgage, as if, in his last will, James H. McLearn had so devised it. Both funds, being charged with the mortgage-debt, must be applied to its payment, in proportion to their respective amounts. And as the property, both real and personal, has been converted into money, the proportionate part of each can be applied to this payment, without difficulty. And any debts of the estate not covered by the mortgage must be paid out of the personal fund.

As the decree of the circuit court was not made in conformity to this view of the case, that decree must be reversed ; and the cause remanded to that court, with instruction to enter a decree in conformity to this opinion.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Georgia, and was argued by counsel : On consideration whereof, it is the opinion of the court, that the mortgage-debt should be paid out of the real and personal property embraced by the mortgage, *pro rata* : whereupon, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed ; and that this cause be and the same is hereby remanded to the said circuit court for further proceedings.

*647] *ALPHONSO WETMORE, Plaintiff in error, v. United States.

Pay of army officers.—Army registers.

A paymaster in the army of the United States, appointed under the act of congress, passed the 24th of April 1816, is entitled to the pay and emoluments of a major of infantry, and not those of a major of cavalry.¹

The army registers, published by the adjutant and inspector-general of the army, containing the general regulations of the army, which are delivered by the department to the officers of the army, are not evidence to establish the pay and emoluments of officers in the service ; these are fixed and determined by acts of congress.

The registers are compilations issued and published to the army, by the direction of the secretary at war, in the exercise of his official authority ; and when authenticated by him, would be evidence of the facts, strictly so, they may contain ; such as the names of officers, date of commissions, promotions, resignations, and regimental rank, brevet and other rank, or the department of the army to which officers belong ; but from none of these can an inference be drawn by a jury, to establish the pay and emoluments of officers ; as they are provided for by law, and must be determined by the court, when they are doubtful, and the subject of dispute in a suit between an officer and the United States. Nor can such registers be evidence of the correctness of any classification of the officers of departments into a general staff of the army ; for though they are probably correct, being prepared by persons whose professional duty it is to be well informed upon the subject, and who, from their familiarity with military science and the general arrangement of armies, are supposed to be expert interpreters of the acts of congress for the organization of our army ; still, what officers are of the staff, or general staff, depends upon acts of congress, which are to be expounded by the courts, when an officer claims a judicial determination of his rights as to pay and emoluments, from his having been arranged as belonging to the staff.

ERROR to the District Court of Missouri. An action of *indebitatus assumpsit* was instituted, at September term 1832, by the United States, in the district court of the United States for the Missouri district, against

¹ United States v. Gwynne, 1 McLean 270.

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Alphonso Wetmore, upon an account regularly adjusted, settled and certified at the treasury of the United States, on the 18th of November 1831. The account charged the defendant with the sum of \$3388.18, "for difference of pay and forage, between a major of cavalry and a major of infantry, improperly received by him, and now brought to his debit." At the foot of the account, there was a statement by the second auditor of the treasury, as follows : "the same being the difference of pay and forage claimed by him, between a major of cavalry and *a major of infantry, [*648 to which he is considered as not entitled by the accounting officers of the treasury of the United States. The cause was tried by a jury, on the 6th of September 1832, and a verdict was found for the United States.

The United States produced and read in evidence, the duly certified transcript from the treasury, showing the amount of the claim against the defendant. It was admitted on the trial, that the defendant had served as a paymaster (duly appointed as such) in the army of the United States, from the said 24th day of April 1816, to the said 31st day of May 1831 ; and that the amount stated in said account and transcript to be due from the defendant to the United States consisted solely of the difference between the pay and emoluments allowed by the accounting officers to the defendant, and the pay and emoluments retained and claimed by him, during the period of service aforesaid.

The defendant claimed to be allowed for his service, during the period aforesaid, the pay and emoluments allowed, by law, to other officers of the general staff of the army, of the rank of major; and who are entitled to the pay and emoluments of majors of cavalry. He offered in evidence an army register, prepared and published by the adjutant and inspector-general of the United States, in 1816, which register was delivered to the defendant, and other officers of the army ; in the register, the officers of the pay department, created by the act of congress of the 24th of April 1816, were arranged as belonging to the general staff of the army ; which evidence was, on motion of the plaintiffs, rejected by the court, to which opinion of the court, the defendant, by his counsel, excepted.

The defendant also offered in evidence the register of the army of the United States for the year 1831, prepared, published and subscribed by the adjutant-general ; in which register the officers of the pay department were arranged under the head, and as appertaining to the general staff of the army ; which evidence, as offered, was rejected by the court, and the defendant, by his counsel, excepted to the said decision rejecting said testimony. The defendant then offered to read to the jury a general order, dated, "Head-quarters of the army, Adjutant-general's office, Washington, 11th of June 1832," order No. 50, signed by the adjutant-general ; and purporting to have been issued by command of Major-General Alexander Macomb, commander-in-chief ; which order prescribed the dress of *the officers, non-commissioned officers, musicians and privates of the army, and other regulations of the government of the army ; and [*649 contained, among other things, the following, to wit : "the general staff is to include the adjutant-general, the inspectors-general, the aids-de-camp, the officers of the quartermaster's department, the officers of the subsistence department, the officers of the pay department, the officers of the medical department, the commissary-general of purchases." To the reading which

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general order, the plaintiffs, by their counsel, objected ; and the court sustained the objection, and rejected the evidence so offered ; to which opinion of the court, the defendant, by his counsel, excepted.

No further evidence being offered, the defendant moved the court to instruct the jury, as follows : 1. That the defendant is entitled to the pay and emoluments allowed by law to the officers of the general staff of the army, of the rank of major ; that is to say, the pay and emoluments allowed to majors of light dragoons, by the act of congress of the 12th of April 1808. 2. That if the jury find from the evidence, that the defendant was, from the 24th of April 1816, to the time of the statement of the account read in evidence, an officer in the general staff of the army, he is entitled, for the time he has so served, to the pay and emoluments allowed by law to the officers of the general staff, of the rank of major. Which instructions were by the court refused ; and the court instructed the jury that the defendant, in virtue of his office, was entitled only to receive the pay and emoluments of a major of infantry ; to which opinions of the court, in refusing the instructions prayed for by the defendant, and also to the instructions given, the defendant, by his counsel, excepted. The court sealed a bill of exceptions.

The district court gave judgment on the verdict in favor of the United States ; and the defendant prosecuted this writ of error.

The case was argued by *Jones*, for the plaintiff in error ; and by *Butler*, Attorney-General, for the United States.

It was agreed, that the following documents, facts and circumstances omitted in the statement contained in the bill of exceptions, should be supplied by consent, and considered on the argument and decision of this writ [650] of error, as part of the case, in like manner as if they had been annexed to and stated in said bill of exceptions, and had formed part of the original record, to wit :

1. That the two army registers referred to in the bill of exceptions, as printed and published by order of the secretary of war, in the years 1816 and 1831, be annexed to this case and considered as part thereof, and of the record ; and it is admitted, that such registers were prepared, and were issued and published to the army, by the direction of the secretary of war, in the exercise of his authority as such secretary.

2. That the general order, No. 50, of the 11th of June 1832, referred to in said bill of exceptions, be in like manner annexed to this case and considered as part thereof, and of the record : and it is admitted to be an authentic general order, such as it purports to be, and was regularly published and issued to the army.

3. That the 'General Regulations for the Army,' printed and published by the war department, in the year 1828, be in like manner annexed to this case, and considered as part thereof, and of the record ; and it is admitted, that the same are the regulations established by the president of the United States for the government of the army, and were published as such by his authority.

4. That the custom and usage of the army has always been to class the officers of the pay department among the officers of the general staff of the army.

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5. That since the act of the 24th of April 1816 (3 U. S. Stat. 297), for the organization of the general staff, &c., it has been the invariable usage and practice of the treasury department, and of the proper accounting officers, to allow the pay and emoluments of majors of cavalry to the assistant adjutants-general, to the assistant inspectors-general, to the deputy quartermasters-general, and to the topographical engineers; and since the act of the 2d of March 1821 (3 U. S. Stat. 615), to majors on ordnance duty, and to the quartermasters.

WAYNE, Justice, delivered the opinion of the court.—This is a writ of error to the district court of the United States for the district of Missouri, to have a judgment reversed, which was rendered for the United States, against the plaintiff in error. It was admitted on the trial, that the defendant had served as paymaster of the army, duly appointed as such, from the 24th April 1816, to the 31st May 1831. That the amount claimed from him *by the United States was the difference between the pay and emoluments allowed by the accounting officers of the treasury to the defendant, and the amount claimed and retained by him, during the period of his service. The defendant had retained the pay and emoluments allowed by law to officers of the general staff of the army, of the rank of major.

Upon the trial, the defendant offered as evidence two army registers; one published by the adjutant and inspector-general of the army, in August 1816, the other published in 1831, which had been delivered to himself and other officers of the army. In both, the officers of the pay department are arranged as belonging to, or appertaining to, the general staff of the army. He also offered as evidence, a general order, issued by the major-general commanding in chief, dated at head-quarters of the army, adjutant-general's office, Washington, the 11th June 1832; which directs that the general staff is to include the officers of the pay department. These registers, and the general order, the court refused to allow to be read as evidence to the jury; and no further evidence being offered by the defendant, he moved the court to instruct the jury: 1st. That the defendant is entitled to the pay and emoluments allowed by law to the officers of the general staff of the army, of the rank of major: that is to say, the pay and emoluments allowed to majors of light dragoons, by the act of congress of the 12th April 1808. 2d. That if the jury find from the evidence, that the defendant was, from the 24th April 1816, to the time of the statement of the account read in evidence, an officer in the general staff of the army; he is entitled, for the time he has served, to the pay and emoluments allowed by law to the officers of the general staff, of the rank of major. The court refused to give the instructions; and instructed the jury that the defendant, in virtue of his office, was entitled only to receive the pay and emoluments of a major of infantry.

These registers, however, and the general order of the major-general, with the general regulations of the army, printed and published by the war department in the year 1825, have, since the writ of error was sued out, been admitted, by the consent of the attorney-general, to be a part of the original record, as if they had been referred to and stated in the bill of exceptions, and had been proved on the trial. And it is further admitted by the attorney-general and the defendant's counsel, that the custom and usage of the army have always been, to class the officers of the pay department among

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the officers of the general staff of the army; and that since the act of *652] *the 24th April 1816, for the organization of the general staff, &c., it has been the invariable usage and practice of the treasury department, and of the proper accounting officers, to allow the pay and emoluments of a major of cavalry to the assistant adjutants-general, to the assistant inspectors-general, to the deputy quartermasters-general, and to the topographical engineers; and since the act of the 2d March 1821, to majors on ordnance duty, and to the quartermasters.

It is but proper, however, to remark, that the court did right in rejecting the registers and general order, when the defendant offered them as evidence on the trial. The registers are compilations issued and published to the army, by the direction of the secretary at war, in the exercise of his official authority; and when authenticated by him, would be evidence of the facts, strictly so, they may contain; such as the names of officers, date of commissions, promotions, resignations, and regimental rank, brevet and other rank, or the department of the army to which officers belong; but from none of these can an inference be drawn by a jury, to establish the pay and emoluments of officers, as they are provided for by law, and must be determined by the court, when they are doubtful, and the subject of dispute in a suit between an officer and the United States. Nor can such registers be evidence of the correctness of any classification of the officers of departments into a general staff of the army; for though they are probably correct, being prepared by persons whose professional duty it is to be well informed upon the subject, and who, from their familiarity with military science and the general arrangement of armies, are supposed to be expert interpreters of the acts of congress for the organization of our army, still, what officers are of the staff, or general staff, depends upon acts of congress, which are to be expounded by the courts, when an officer claims a judicial determination of his rights as to pay and emoluments, from his having been arranged as belonging to the staff.

However, we are not now called on to say what officers make up the general staff, or what departments of the army may be assigned to it, or are comprehended in it by the acts of congress; nor is it necessary for the decision of this case, to deny that paymasters may not be arranged as of the staff, under the act of the 2d March 1821. Considering the staff as a central point of military operations, whence should proceed all general orders for the army, the orders of detail, of instruction, of movement, all *653] general measures for subsisting, *paying and clothing the army; and as the administrative organ of all supplies for the military service and land defence of the country; it seems to us, that paymasters, from their duties and responsibilities, should be classed with the general staff; and we presume it has been done under the act of the 2d March 1821, which, without being express upon the point, has rendered indeterminate the previous acts of congress fixing with certainty the officers composing the staff. Conceding, then, for the purposes, of this argument, that paymasters are of the staff; does it strengthen the claim of the defendant to the pay and emoluments of a major of cavalry?

The position taken in favor of cavalry pay is, that paymasters, being of the general staff, are entitled, by the third section of the act of the 24th April 1816, to the pay and emoluments allowed by law to the officers of the

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general staff of the rank of major. The third section declares, "that regimental and battalion paymasters shall receive the pay and emoluments of majors," without the additional words of cavalry or infantry. The ninth section of the same act secures to the several officers of the staff, the privileges, pay and emoluments of the act of the 3d March 1813. By the third section of that act, the assistant adjutants general, assistant inspectors-general, deputy quartermasters-general, and assistant topographical engineers, are declared to have the brevet rank and the pay and emoluments of a major of cavalry. These are the officers of the staff, upon an equality with whom, in regard to pay and emoluments, it is contended that paymasters are placed by the act of the 24th April 1816. The question depends entirely upon the construction of the acts of congress. Having examined them, we are of opinion, that congress meant, by the words "the pay and emoluments of major," those of a major of infantry.

It was urged, however, in the argument, against this conclusion, that congress, in referring to the pay of major, to fix that of paymasters, when there are different amounts of pay allowed to majors, according to the nature of the service, had reference to those whose duties are most analogous to that of paymasters, and who belong to the same branch of service. That paymasters belong to the staff of the army; and all officers of the staff who receive the pay of major, are allowed cavalry pay. That there was a strong analogy between deputy quartermasters and paymasters, both being of the staff and disbursing officers, which raised a fair and strong presumption that *congress intended paymasters should receive the same pay and [**654 emoluments as deputy quartermasters, or majors of the staff.

Upon these suggestions of analogy, we remark, it will not be pretended, before the act of 1816 was passed, that any relation existed between paymasters and the officers of the staff receiving the pay of a major of cavalry, to enable the former to have their pay graduated by that standard. In all the acts of congress, providing for the appointment of paymasters, whether they were regimental or district paymasters, or whether they were to be selected from the line of the army, or from citizens not of the army, the pay was fixed in reference to the duties and responsibilities of the appointment, without reference to any connection of paymasters with the staff, and without regard to any analogy of duty between paymasters and any officer of the staff. In truth, the only analogy existing between paymasters and any officer of the staff, is that to deputy quartermasters; both being disbursing officers. The want of general analogy, then, shows that congress could not have been influenced in fixing the pay of paymasters by any such consideration; and the particular analogy between them and a single class of officers, in a single point, is insufficient to sustain such a presumption. Besides, the act relied upon to establish the equality contended for, makes a difference between paymasters and the officers of the staff, in regard to rank; enough of itself to account for the larger pay and emoluments allowed to the latter. They have the brevet rank of majors of cavalry which is not given to paymasters; and to the latter, the law allows no rank. The language of the act of 1813, referred to in the ninth section of the act of 1816, is, that the assistant adjutants-general, assistant inspectors-general, deputy quartermasters-general, and topographical engineers, shall have the "brevet rank," and the pay and emoluments of a major of cavalry. The section of the act

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of 1816, fixing the pay of paymasters, omits the words "brevet rank." As well might it be contended, that they should have it, as that the words of *cavalry* should be added to the word *major*. One would do more violence to rules for the construction of statutes than the other; but both would be in harmony with the principle applied in this instance, to give the paymasters cavalry pay. Rank, of itself, in every service, is a good ground for a distinction in pay: and though it has not been followed, or has rather been abandoned, in ours, in favor of the brevet rank of officers in the line and staff, it should be presumed to apply to persons having rank, and those *who have none. Cavalry pay, then, having been claimed on the [655] ground of equal grade in the staff, the fact being otherwise, nothing is left to sustain the claim.

But it will be asked, by what considerations is it determined that the pay and emoluments of paymasters are those of a major of infantry? We answer, first, that all the previous legislation of congress, from the earliest period of the government, and its practice, give a rule which should be decisive of this question. The acts, from 1792 to the 2d March 1821 (the last upon the subject), show, that congress, in determining, at different times, the pay of paymasters, have always fixed it with reference to the pay of an officer in the line, with such additional compensation as was deemed to be a remuneration for increased duty and responsibility; whether the selection was to be made from subalterns of the army, or from citizens; and when the latter, where there was a deviation, it has been by giving a fixed monthly compensation. This uniformity of practice certainly outweighs any presumption that can be raised from the ninth section of the act of 1816, that there was to be a sudden change of it in favor of staff pay; especially so, when the ninth section can only be received as providing for a certain officer, officially designated in the act of 1813, and entirely independent of the third section of the act of 1816, which had already fixed the pay of paymasters. It would be very difficult to connect the two sections, the third and ninth, in any way, to bear upon each other; and the mistake in doing it has arisen from going out of the statute, and engraving upon the intention of congress the exterior consideration that paymasters had been arranged under the general staff.

Again, when the acts speak of regimental and battalion paymasters, these laws must necessarily refer to the existing composition of the army, whether it be made up of all, or one, of the different arms of defence; and cannot, without great violence, be supposed to mean one of them, not comprehended in the existing military establishments of the country. So also, when the law speaks of a major, the term is most naturally considered as having been used in reference to such officers of that rank, and of such regiments actually being of the army, or to the army as it exists; and when it is used without regimental designation, implies a major of infantry; this arm of defence having been made the main body of modern armies. We think, military men must so understand it; because, in this, as in other cases where distinct parts from the minor portion, the larger *or main body is understood [656] without particular designation, and the minor requires it, to ascertain with certainty what part is referred to as spoken of. So that where the ninth section of the act of the 2d of March 1821, declares that there shall be fourteen paymasters, with the pay and emoluments of *regimental* pay-

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masters ; and when to ascertain what the pay and emoluments are, we have to resort to the third section of the act of 1816, and there find it to be those of a major : the law must mean a regimental and not a staff major—a major of infantry. Certainly, it should not be tortured to mean a major of one of the arms of defence or kinds of regiment, of which there is none in the army. When the act of 1816 was passed, cavalry did not form a part of the army ; consequently, no such rank as major of cavalry existed, by which the pay of paymasters could have been graduated. But it was urged in argument, that there was such a thing as the pay of a major of cavalry, subsisting in legal contemplation. There was ; but for no other purpose than as giving the standard of pay to certain staff officers. It is not probable, that congress, when fixing the pay of paymasters, referred to what only existed in contemplation of law ; in preference to what existed in fact, to guide its determination.

But another, and the only remaining consideration to which we shall allude, as decisive of the interpretation here given to the third section of the act of 1816, is the contemporaneous exposition and practice under it, by the accounting officers of the treasury, and acted upon by congress, when, five years afterwards, it re-organized the pay department of the army. The ninth section of the act of the 2d of March 1821, to reduce and fix the military peace establishment, declares, that there shall be one paymaster-general, with the present compensation, and fourteen paymasters with the pay, &c., of regimental paymasters. This act, in reference to the paymaster-general, is positive in continuing the existing compensation ; and the term regimental, applied to the paymaster, is to be taken in the sense in which it is used in the act fixing the peace establishment, or to the kinds of regiment of which the army was to be composed ; and as continuing the paymasters upon the footing they actually were, and had been for five years, in regard to pay and emoluments. Congress knew what these were, and cannot be supposed to have intended to re-enact the law of 1816, with the construction of it here contended for ; in opposition to the practice of the treasury department under it.

Judgment affirmed.

*MATTHEW ST. CLAIR CLARKE, Plaintiff in error, v. CONRAD [*657 KOWNSLAR.

Charge of the court.

The circuit court were required to instruct the jury upon points of law growing out of allegations of facts, of which there was no evidence or proof ; the refusal of the court to do so was correct.

ERROR to the Circuit Court of the District of Columbia, and county of Washington.

This case was argued by *Coze*, for the plaintiff in error ; and by *Dunlap* and *Key*, for the defendant.

The court, in their opinion, having decided that none of the questions which were argued, were presented by the evidence in the circuit court, the arguments of counsel on those questions are omitted.

Clarke v. Kownslar.

STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia, for the county of Washington. Kownslar brought the original action in November 1832, against Clarke, upon the following letter of guaranty :

“Conrad Kownslar :

Mill Creek, Virginia.

Dear sir :—If you will make James Miles of this city your agent, as you intimated to him, I will see your money paid in due course of sales. He asks five per cent. commission ; and will take all intended for this market. He wishes an answer. Your obedient servant,

MATTHEW ST. CLAIR CLARKE.”

“Washington, the 27th of September 1828.

Kownslar received the letter ; and sent paper accordingly to Miles, between November 1828, and December 1829, amounting (as the declaration avers) to the value of \$8396.75, part of which paper was afterwards returned, and upon the sales of the residue there remains due and unpaid (as the declaration avers) to Kownslar, the sum of \$4238.62 $\frac{1}{2}$, after deducting commission, to recover which sum the action was brought. *At the trial, [upon the general issue, a verdict was found for the plaintiff, upon which judgment was rendered in his favor ; and the present writ of error is brought to revise that judgment.

Two bills of exception were taken, the second only of which is now before the court for consideration, excepting only so far as the evidence contained in the first is referred to in the latter. It appears from these bills of exception, that, at the trial, the plaintiff offered in evidence the letter of guaranty, and then the testimony of Miles, who proved, that he was a commission-merchant, in the city of Washington, for the sale of paper and other articles of stationery ; that he received consignments of such articles from several persons, who were not in any manner secured or guaranteed by any persons for their consignments ; and he also further testified, that after the said letter was written, the plaintiff sent sundry packages of paper to him for sale ; and that before he sent the same, he informed Miles, that he had received the said letter from the defendant, and should send it. On cross-examination, he further proved a letter (dated November 4th, 1828), accompanying the packages first sent, and also certain articles of agreement entered into between Clarke and the witness (dated the 1st of October 1828), both of which papers are in the record ; and that, after the said paper was received from the plaintiff by Miles, the defendant (Clarke) knew of it, and was then, and afterwards, in the habit of inspecting the books kept by the witness, in which the paper, as received by the witness from the plaintiff, and the sales made thereof from time to time, as the same was received and sold, were entered. He further testified, that on the 28th of April 1830, he terminated his business as such commission-merchant, and made a general assignment of all his stock, books, &c., to the defendant, who took possession, under the same, of various articles then in the store of Miles ; but he never did take possession of, or exercise any control over, the paper so lying in his said store belonging to the plaintiff ; but the same was delivered to, and received by the plaintiff. The assignment was then introduced.

These are all the facts stated in the first bill of exceptions. The second

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proceeded to state, that after the testimony so given, the plaintiff proved, by Miles, that the usage and practice of commission-merchants in the city of Washington was to sell, either on credit or cash, the articles consigned. But that as soon as the proceeds of sales are received by such commission-merchant, he at once becomes responsible to the consignor for the proceeds, and is not entitled to *any credit for the same. He further gave in evidence the books of Miles, and two certain drafts for \$1000 each, [*659 with the indorsements and protests of the same. Each of these drafts was dated Mill Creek, October 31st, 1829, drawn on Miles, and payable to the order of Lewis Hoff, Esq., cashier, one in ten days after date, the other in thirty days after sight; and were each accepted by Miles on the 5th of November of the same year.

The plaintiff further offered to prove by Miles, and he testified, that when he accepted these drafts, he had no funds from the collection of sales of the plaintiff's paper; but he accepted the same in expectation of making such collections, which, however, he was not able to make. The defendant then gave in evidence certain letters of the plaintiff to Miles, dated on the 13th of May, and the 17th of October 1829. The first letter, after speaking of paper sent, and of other paper of the plaintiff on hand, &c., added, "you will please to send me a check for the amount you advised I should draw on you for at thirty days. By so doing you will have eight to ten days after date, till it will be presented for pay." The second, after asking for information by the bearer, how Miles comes on with the sale of his paper, &c., added, "my draft, I presume, will be presented soon. I hope you will not suffer it to be returned." The plaintiff then read to the jury the account between him and Miles, showing the amount claimed in the suit.

The defendant's counsel then prayed the court to instruct the jury as follows: that if they shall believe from the said evidence, that according to the ordinary usage of the business of commission-merchants in the city of Washington, in which Miles was engaged and in which he acted in receiving, selling and accounting for the paper consigned to him, no credit was allowed or given to such commission-merchant, and that, without the knowledge, privity or consent of the said defendant, the plaintiff drew upon Miles for the sums of money, which he had received as the proceeds of said sales of his paper, so made by Miles, which drafts were payable at distant days or periods, that then such drafts, so drawn as aforesaid and accepted by Miles, payable according to their tenor, amount to a credit given by the plaintiff to Miles; and that such credit, so given, constitutes a new agreement and discharges the defendant from his liability on his said letter of guaranty. The court refused to give the instruction as prayed; and to this refusal the defendant excepted: *and the propriety of this refusal constitutes [*660 the sole point for our consideration.

We give no opinion upon the instruction, as matter of law, because we are of opinion, that there was no evidence whatsoever before the jury, which called upon the court to give it; and that upon this account it was properly refused. There was no proof before the jury, that Miles, at the time of the acceptance of the drafts, had any money in his hands, which he had received as the proceeds of the sales of the paper of the plaintiff. The drafts being payable at future times, the mere acceptance of them by Miles did not establish any such fact; for it is a known and ordinary course of

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business for such acceptances to be made, not only when the acceptor has funds in his hands, but also when funds are expected to be received by him before the maturity of the drafts ; and indeed, often for the accommodation of the drawers, when the acceptor, being a commission-merchant, has the property on hand, out of the sales of which he expects to reimburse himself for the advance. The theory of the law, which supposes the acceptor to have funds of the drawer in his hands, is a theory mainly intended for the security of third persons, and leaves the transaction to be judged of, between the parties themselves, according to the ordinary course of business between them. But without resorting to these considerations, the fair presumption would seem to be, in cases like the present, that drafts, drawn payable at future periods, were designed to reach funds not yet received, but to be received at the maturity of the bills. The present case, however, does not stand upon presumptions. Here is positive proof from Miles (who seems to have been the only witness in the case), that at the time he accepted the bills, he had no funds in his hands, but that he expected to make collections, which, however, he did not make. And the written documents, in no shape, shake his testimony. Indeed, a part of the very instruction, as framed, seems founded upon the credibility of that testimony. So that we do not perceive how, consistently with the rules of law, the instruction could be given, as there was no evidence before the jury conduced to prove the facts on which it was founded. The judgment is, therefore, affirmed, with six per cent. damages and costs.

THIS cause came on to be heard, on the transcript of the record
*from the circuit court of the United States for the district of Co-
*661] lumbia, holden in and for the county of Washington, and was argued
by counsel : On consideration whereof, it is adjudged and ordered by this
court, that the judgment of the said circuit court in this cause be and the
same is hereby affirmed, with costs and damages at the rate of six per
centum annum.

*662] *The MAYOR, ALDERMEN and INHABITANTS of NEW ORLEANS,
Appellants, v. UNITED STATES.

Dedication.—Alluvion.—Grant.

The United States alleged, by a petition presented to the district court of the United States for the district of Louisiana, that by the treaty of cession of the late province of Louisiana, the United States succeeded to all the antecedent rights of France and Spain, as they then were, in and over the province, the dominion and possession thereof, including all lands which were not private property ; and that certain lots and vacant lands in front of the city of New Orleans, which the petition asserted passed to the United States by the cession, had, by an ordinance of the city, been directed to be sold for the use of the city ; the petition prayed, that the city of New Orleans should be perpetually enjoined from selling the same, or doing any other act which should invade the rightful dominion of the United States over the said land, or their possession of it. The city of New Orleans claimed the ground, which lies between the line of the front houses of the city and the river Mississippi. 1st. As having been left by the king of France as quays, for the use and benefit of the city ; 2d. Because if, since the foundation of the city, the space of ground became wider than was necessary for the use of the city, as quays, it was occasioned by alluvial deposits in front of the city, in consequence of works erected by the inhabitants, at the expense of the city, to advance the levee in front on the river ; 3d. Because, by the laws of Spain, in force when the alluvions were reformed in front of the city,

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such formations belonged to the inhabitants of the cities, who might dispose of the same as they might think convenient, on their leaving what was necessary for the public use. The district court of Louisiana ordered a perpetual injunction as prayed; and that decree was reversed, on appeal.

In order to dedicate property for public use, in cities and towns and other places, it is not essential, that the right to use the same shall be vested in a corporate body; it may exist in the public, and have no other limitation than the wants of the community at large. The principles upon which the cases of *Cincinnati v. White*, 6 Pet. 481, and *Barclay v. Howell* were decided, examined and affirmed.

If buildings had been erected on lands within the space dedicated for public use, or grants of part of the same had been made by the power which had authority to make, and had made, a dedication of the same to public use; the erection of the buildings and the making of the grants would not be considered as disproving the dedication, and the grants would not affect the vested rights of the public.

The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil; no other rule can be applied, on just principles. Every proprietor whose land is thus bounded, is subject to loss by the same means which may add to his territory; and as he is also without remedy for his loss in this way, he cannot be held accountable for his gain. This rule is no less just, when applied to public, than to private rights.¹

It would be a dangerous doctrine, to consider the issuing of a grant, as conclusive evidence of a right in the power which issued it; on its face, it is conclusive, and "cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantees." [*663]

APPEAL from the District Court for the Eastern District of Louisiana. On the 3d day of March 1825, the attorney of the United States for the eastern district of Louisiana, filed a petition in the district court, stating, that the mayor of the city of New Orleans, in pursuance of an ordinance of the city council thereof, to that effect, had advertised for sale, in lots, the vacant land included between Ursuline, Levee and Garrison streets, and the public road in the city of New Orleans; and also the vacant land included between the Custom-house, Levee and Bienville streets, and the public road in the same city. That by the treaty of cession of the late province of Louisiana to the United States, they succeeded to all the ante-

¹ In *Jones v. Soulard*, 24 How. 41, it was decided, that the city of St. Louis is a riparian owner upon the Mississippi, and as such, entitled to all accretions as far out as the middle of the stream. And see *Schools v. Risley*, 10 Wall. 91; *St. Clair County v. Lovington*, 28 Id. 46. In the latter case, Justice SWAYNE says, "alluvion may be defined, as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous; it is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible, in the sense of the rule, is, that though the witnesses may see, from time to time, that progress has been made, they could not perceive it, while the process was going on. Whether it is the effect of natural or artificial causes, makes no difference; the result, as to the ownership, in either case, is the same. The riparian right to future alluvion is a vested right; it is an inherent and essential attribute of the original property. The

title to the increment rests in the law of nature: it is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds, to their natural increase. The right is a natural, not a civil one; the maxim, *qui sentiat onus debet sentire commodum* lies at its foundation; the owner takes the chances of injury and of benefit, arising from the situation of his property; if there be a gradual loss, he must bear it; if a gradual gain, it is his. The principle applies alike to streams that do, and to those that do not, overflow their banks; and where dykes and other defences are, and where they are not, necessary to keep the water within its proper limits." *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122. In England, the rule is applied to such accretions, on the shores of the sea. *King v. Lord Yarborough*, 2 Dow & Clark 178. And see *East Hampton v. Kirk*, 84 N. Y. 215; *Mulry v. Norton*, 29 Hun 660; s. c. 61 How. Pr. 197.

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dent rights of France and Spain, as they then were, in and over the province, the dominion and possession thereof, including all lands which were not private property ; and that the dominion and possession of the vacant lands endeavored to be sold by the city council had, ever since the discovery and occupation of the province by France, remained vested in the sovereign, and had not, at any time prior to the date of the treaty, been granted to the city of New Orleans. " Wherefore, inasmuch as the said attempt of the said city council to sell the lands as private property, is an invasion of the rightful dominion and possession of the United States in the premises," the petition prayed that the mayor, aldermen and inhabitants of New Orleans might be summoned to appear and answer the petition ; and in the meanwhile, that they might be inhibited by injunction from proceeding further in the said attempt, or from doing any act to invade the rightful dominion and possession of the United States in the said land ; and that after due proceeding, the injunction be made perpetual ; and also for all other suitable and needful relief.

The district judge ordered an injunction, according to the prayer of the petition. In December 1827, the corporation of New Orleans filed an answer to the petition of the United States, which, after the usual reservations, denied all the material facts and allegations in the petition ; and positively denied that the dominion and possession of the pretended vacant land, which the respondents had offered to sell, by an ordinance of the city council, " was, or did (at the time *of the treaty of cession to the United States) remain, vested in either the king of Spain or the sovereign of France, either as vacant land, or under any other denomination, and that the same passed as such to the United States. The answer prayed that the petition should be dismissed, and the injunction dissolved.

In December 1829, the corporation of New Orleans filed a supplemental answer to the petition of the district-attorney of the United States ; in which they asked leave to add the following pleas to those contained in their original answer. They said, that the inhabitants of the city of New Orleans were the true and lawful proprietors of the property. 1. Because all the space of ground which existed between the front line of the houses of the city and the river Mississippi, was left, by the king of France, under the name of *quays*, for the use and benefit of the said inhabitants ; as appeared by authentic copies of the original plans of the foundation of the city. 2. Because if, since the foundation of the city of New Orleans, the space became wider than was necessary for public use, and for the *quays* of the city ; it was in consequence of an increase formed by alluvion in the greatest part of the front of the city, and the works which were successively made, from time immemorial, by the inhabitants of the city, at their expense, to the levee in front thereof, to advance it nearer to the river than it was formerly. 3. Because, by the laws of Spain, which were in force at the time the alluvions were formed, and said works were made, alluvions formed by rivers in front of cities belonged to the inhabitants thereof ; who might dispose of the same as they thought convenient, on their leaving what was necessary for the public use. Further, they said, the vacant lots claimed in the petition were worth the sum of at least \$60,000, of the property and disposal of which the respondents could not be deprived, unless they were previously indemnified therefor by the government of the United States.

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The United States, in December 1830, filed a replication to these pleas, denying all the allegations contained in the answer, and the supplemental answer to the petition.

The case was afterwards submitted to a jury ; but on the jury not being able to agree, they were discharged by the court, with the consent of the parties. Afterwards, the trial by jury being waived by consent, the case was submitted to the court upon statements of *facts prepared by the parties ; and on the 18th day of June 1831, the district court [*665 made a decree in favor of the United States, being of "opinion, that the defendants had not exhibited sufficient evidence to support their title to the premises in dispute ;" and decreed, that the injunction of the United States be made perpetual. The corporation of New Orleans prosecuted an appeal to this court.

The statement of facts exhibited, as proved by the United States, contained :

1. A reference to proceedings before the commissioners of the United States, under the acts of congress relating to the adjusting of land-claims in Louisiana, relative to certain claims of lands within the property asserted to belong to the corporation of New Orleans ; which claims had afterwards been confirmed by congress.

2. A grant for a part of the land to Francisco Loiteau. The particulars of the claims, referred to in No. 1, and of the grant to Loiteau, are stated in the opinion of the court.

3. Evidence that, on the ground, the United States, in 1819, erected a building for a custom-house, in which the courts of the United States were held ; that previous to 1793, the Spanish government had erected, on part of the ground, two buildings ; one used as a custom-house, at the time of the cession ; the other, as a tobacco warehouse ; that a portion of a brick house still existed on the lot granted to Francisco Loiteau ; that the corporation had erected water-works on part of the ground, which were rented to individuals ; barracks for the accommodation of the garrison of New Orleans were placed on the ground by the French government, in 1757, which existed and were occupied, at the time of the cession.

4. An act of congress of 1812, granting to the city of New Orleans a lot of ground in the city ; an act of 3d March 1822, entitled "an act supplemental to an act entitled an act authorizing the disposal of certain lots of ground in the city of New Orleans and town of Mobile," which was alleged to have been passed at the instance of the corporation of New Orleans.

5. A copy of proceedings before the commissioners of the United States on certain claims of the corporation of New Orleans, relative to part of the ground.

6. An ordinance of Don Alexander O'Reilly, dated the 22d February 1770. This decree designated the city properties "of the city *of New Orleans," but did not include in the same the property in controversy. [*666

7. The mayor, aldermen and inhabitants derived a large revenue from duties imposed on vessels and boats moored at the levee, in front of the city of New Orleans. It amounted, during the year 1830, to \$30,000. And a duty had always been collected by the municipal authorities of New

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Orleans on vessels moored at the levee, since the promulgation of the ordinance of O'Reilly, above referred to.

On the part of the corporation of New Orleans, the following statement of facts, and also the documents annexed to the same, were filed in the cause:

1. From time immemorial, both before and subsequently to the cession of Louisiana to Spain, there had existed, for the convenience of commerce, both in the towns of France, and in those of the French colonies, situated on navigable streams, or on the sea-shore, a vacant space between the first row of buildings and the water's edge ; which vacant space was generally termed a *quay*, and was destined for the reception of goods and merchandise imported, or to be exported. These quays are of various dimensions, regulated, in sea-ports, by commercial operations and convenience, and in those situated on rivers, both by the above considerations, and by that of the encroachments which the rivers might make on their banks.

2. Nevertheless, the government, or municipal authorities of those places, frequently permitted buildings, intended for purposes of public or private convenience, such as market-houses, fountains, baths, coffee-houses, &c., to be erected on part of those *quays*.

3. Towns in the French colonies had never been incorporated, like those of the United States ; they were founded in virtue of orders emanating from the government, or from the minister of the marine, and transmitted to the governors of the colonies ; and their administration was confined to intendants, who had authority to enact the necessary police regulations.

4. The governors of colonies, on receiving these instructions, issued their orders to the chief engineer of the colony, or, in default of such officers, to a surveyor, to draft a plan of the projected town. This engineer or surveyor drafted the plan and signed it, with mention of the place and day, month and year, when it was completed. This plan, thus signed and dated, [667] was delivered over to the governor, *and lots and squares were granted or sold out to individuals, with reference to it.

5. The chief engineer was an officer of the royal corps of engineers, and performed the duties both of military and civil engineer.

6. For a number of years before the revolution, there had existed in France, an office attached to the navy department, in which all manuscript plans and maps of the French colonies, or their cities, forts, fortifications, &c., were deposited.

7. All the land on the banks of the Mississippi, in lower Louisiana, was alluvial. This river was subject to annual and periodical rises, and unless its waters were confined within the channel, by strong embankments, they would overflow all the adjoining land, until they fell and retired within the bed of the river ; that is to say, during about five or six months in each year. But for these dikes, or *levees*, as they were here called, the construction and maintenance of which cost, the inhabitants, who were, and had always been, liable to the performance of this duty, a great deal of money and labor, the whole country bordering on this part of the Mississippi, would be uninhabitable during the spring and summer.

8. During this rise, the Mississippi was continually effecting changes in its banks ; it undermined them in the bends, and carrying off the earth which it detached, deposited it on the points ; so that in many parts of these bends,

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as soon as the waters fell and returned to their accustomed bed, the land on the margin, being deprived of support, gave way, fell into the stream, disappeared, and was carried down by the current, until it was united to the bank at some lower part of the river.

9. For these reasons, it was an almost universal usage among persons dwelling on the banks of the river, to build their houses at a sufficient distance from its margin, to allow space for the construction of new levees and to furnish new public roads, without being compelled to remove their houses and other buildings, whenever the levees and roads were carried off by the stream.

10. Under the French and Spanish governments, the vacant space between the first row of buildings and the margin of the Mississippi, always existed; it never was divided into squares and lots. The streets of the city had never been laid off, or continued from said row of houses to the river. It was only in 1818, that the corporation caused the said streets to be prolonged as far as the levee.

11. Under the Spanish government, there was, on this vacant space, near the river, a wooden market-house, constructed by the **cabildo* (council), between St. Anne and Dumaine streets. This building was [^[*668] demolished by the corporation, and the present market-house constructed on the same spot. There was, also, on this square, and adjoining to the levee, between Dumaine and St. Philip streets, a wooden building, belonging to Mr. Arnaud Magnon, who had erected it, in virtue of an authorization from the Spanish governor. This same Magnon had, with the permission of the *cabildo*, built, near the same spot, and lower down than this house, between the river and the levee, and on an alluvion then recently formed, a large shed or scaffold, which he used as a workshop, he being a ship-builder. There were also, on this part of the bank, at the foot of the levee, in front of the public square, several small wooden cabins, which the *cabildo* had permitted the individuals to erect there, after the fire of 1798, who were subject to the payment of a small annual rent, for the benefit of indigent orphan children. These huts were destroyed, after the cession of Louisiana to the United States, and at the instance of the corporation. There were also on this vacant ground, under the Spanish government, 1st, a wooden building, between Custom-house and Bienville streets, which was used as a custom-house; 2d, a large store-house, also of wood, near the said custom-house, in which the tobacco (of which the government had a monopoly) was stored. This store-house did not exist, at the time the United States took possession of the country. The custom-house, which was in a very bad condition, was abandoned at that time, and the United States custom-house was established, at the time of the cession, in a small building situated on a portion of the ground occupied by the old royal store-houses, between Dumaine and St. Philip streets.

12. Before the cession of this country to the United States, this vacant space, throughout the whole extent of the front of the city, was used by the public. It was, at that time, covered with grass and weeds, and the horses and cattle of the citizens were sent to pasture upon it. Since the cession, and since the increase of the commercial business of the city, the vegetation had disappeared, but the inhabitants of the city had, particularly since the cession, continued to use the greater portion of this space for the trans-

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portation, lading and unlading of goods, and as a place of deposit for materials, &c. The streets, running at right angles to the river, were prolonged by the corporation, as far as the levee, and this prolongation was executed *~~669~~ and kept up at their expense. In 1818, they made, and had *since ~~669~~ kept in repair, at their own expense, a new street, or high road, on that large open space, at the foot of the levee, and throughout its whole extent.

13. Under the Spanish government, the inhabitants possessed the commons all around the city; a part of which they appropriated to various uses. Governor Carondelet, at the request of the *cabildo*, caused a plan of it to be prepared, by the surveyor-general, Laveau Trudeau, which was not finished until the year 1798; a copy of which plan was annexed to the proceedings in this cause.

14. The levee in front of the city had always been made and kept in repair by the inhabitants of New Orleans. In 1805, this levee was, generally, throughout its whole extent, three and a half feet high, from fifteen to twenty feet broad at top, and widening towards the basis.

15. Before the year 1815, this levee was undermined in many places, by the river, and threatened to fall in. In order to prevent this accident, which would have compelled the corporation to make a new one, nearer the houses, and consequently, on the vacant space, they caused, at their own expense, carpenter's work, to a large amount, to be done in front of the levee; by means of which it was put in the strong and solid state in which it then was. The point at which this work was most required, and where most of it was performed, was between St. Louis and Toulouse streets; where the soil on which the levee rested was so much undermined by the current, that the water sprung up through it in large quantities, and the owners of the houses in that quarter feared that their foundations would give way. The works above mentioned arrested the progress of a danger which was so justly apprehended.

16. Since the taking possession of Louisiana by the United States, an alluvion had been, and was still continually forming, in the river Mississippi, in front of the city of New Orleans; particularly, towards the upper end and lower extremities of the city. These alluvial formations are exhibited, together with the streets made in 1818, in the plans drafted by Joseph Pelie, city-surveyor; and which were annexed to the record.

17. In consequence of works ordered by, and performed at the expense of, the corporation, the levee in front of the city was then, in the upper part of the city, 140 feet wide; in the centre of the city, from 66 to 80 feet wide. These augmentations had been made, without encroaching on the *~~670~~ vacant space *between the street opened in 1818, and the water's edge, on the alluvial soil since formed on the outside of the levee.

18. Parts of this vacant space might be disposed of to individuals, without at all interfering with the public use of it, or with the loading or unloading of goods, the levee, as it then was, being amply sufficient for all these purposes.

19. There were two copies of plans of the city annexed to the record; the one, made in 1724, by Mr. De Panger, and signed by him; the other, made in 1728, by Mr. Nicholas Broutin; on both of which, the vacant space, the subject of the present controversy, was designated by the name of *quay*.

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The former of these plans was not authenticated ; the latter was authenticated, according to all the forms required in France for the authentication of copies of acts or instruments in foreign countries. These two copies of plans were taken from copies deposited among the archives of the city, since the end of the year 1819 ; and which Moreau Lislet, Esq., counsellor-at-law for the corporation, had caused to be obtained from the office of plans and maps of the French colonies, attached to the department of the navy and of French colonies. Nicholas Broutin was the engineer of the king of France, in Louisiana.

20. Authentic copies of various instruments, by which lots situated in front of the city were granted or sold, under the French government, before the cession to Spain, and in which they were designated as situated on the quay, or fronting the quay.

21. A plan which is found in the work of Peré Charlevoix, the Jesuit, entitled "History of New France, with the historical journal of a voyage undertaken by order of the king, in North America," published at Paris in the year 1724, in three volumes, in quarto, vol. 2, p. 423 ; in which also, the vacant space, the subject of the present controversy, was denominated a quay.

22. The laws of France, and of its colonies, prevailed in Louisiana, from the first settlement of the colony, until the 25th of November of the year 1769 ; when Alexander O'Reilly, captain-general, invested with full powers for that purpose by the king of Spain, abolished them, and substituted in their stead the laws of Spain ; which were in force at the time this suit was instituted.

23. Three works, entitled "Histoire de St. Domingue, par Moreau de St. Mary," in two volumes, in quarto ; "Histoire de la Nouvelle France, par le Peré Charlevoix," three volumes, in quarto ; and "History of Louisiana, by François Xavier Martin," in two volumes, in octavo, were [*671 admitted to be works of accuracy and authenticity, on the subjects of which they treated ; and might be referred to as evidence in this cause.

The case was argued by Webster and Livingston, for the appellants ; and by Butler, Attorney-General, for the United States. A printed argument, prepared by the counsel for the appellants in New Orleans, was also laid before the court.

The appellants insisted :—1. Upon the original plans of the city, as made by the king of France, at its foundation in the years 1724 and 1728 ; from which it appears, that the space of ground in question, to its whole extent, was designated as quays or wharves. 2. The concurrence in this fact of every plan of the city, now extant, having any semblance of authority, as that of Charlevoix's History, and the absence of any document that gives a contrary, or that does not give this destination to it. 3. The uninterrupted possession and enjoyment of the land, as common, by the inhabitants of the city, from the years 1724 and 1728, up to the commencement of this suit. 4. That all the lots and squares of the city, have been sold or granted in reference to the plans before mentioned. This fact, admitted in clear and unqualified terms, might be considered as decisive of the case. 5. The universal understanding of the highest officers of the French government in the colony, and the notaries and persons engaged in the purchase and transfer of

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property, as exhibited in the various acts and documents, found in the record, and the repeated acts of the *cabildo* or city council, exercising ownership and jurisdiction over the land. 6. That the streets of the city were never continued through this space to the river, until the year 1818, when it was done by the corporation. It continued entirely vacant, for public use, as commons of the city.

Webster, for the appellants.—The United States claim in this case the exclusive right over the property described in the proceedings, by virtue of *672] their sovereignty; *and as succeeding to the sovereign rights of the kings of Spain and of France, over the territory of Louisiana, before the treaty of cession. They claim this as ungranted or vacant land ; and as such, that it passed to the United States by the treaty. While they do not deny that it may be subject to certain uses by the inhabitants of the city of New Orleans ; they do deny that these uses have given any right of property in the soil, or authorized any interference with it, so as to change or affect it in any manner.

This is opposed by the appellants. They assert this property to be exclusively theirs ; and that it was the property of the corporation of New Orleans, before the United States acquired the territory of New Orleans. That it was theirs, by its having been a part of the city of New Orleans, from the first establishment of the same, by dedication ; when the place was first laid out by those who were proprietors of the whole soil ; by possession ever since ; and that if it had become enlarged by the addition of alluvion deposits, the additions, under the laws of France and of Spain, before the cession, and by the law of the United States, since the treaty, are the property of the corporation.

The position of New Orleans, and the peculiar character of the river Mississippi, make such additions from alluvion deposits, frequent and extensive. The sinking of a frame of lumber, at the expense of the inhabitants of New Orleans, at a particular place in the river, opposite to the city, for the protection of the ground, has contributed to the rapid and extensive enlargement of the open space in front of the city. This enlargement has placed the levee, used for the purposes of trade, further in advance of the city ; and has left the ground, now in controversy, in such a situation as not to be required for the uses of commerce. The corporation of New Orleans, therefore, proposed to sell and dispose of it, to be occupied and improved by those who may desire to purchase it. So fully is it manifested, that for commercial or any other public purposes, large portions of the property are no longer required, that it has, since the commencement of this suit, been sold, by agreement between the United States and the corporation ; and the proceeds of the sale, nearly \$1,000,000, may belong to the successful party in this appeal.

But the question to be settled in the case before the court, on the proceedings in the district court of Louisiana, is not, whether the corporation of New Orleans has a right to use the property. It is the question, whether, *673] by the treaty of cession, the United States acquired *a right to the same, as having had transferred to them the sovereign rights of Spain, and afterwards of France, over the territory ? This is the right asserted by the petitioner, and put in issue by the answers and pleas. The United

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States contend, that if the right of dominion did remain in the sovereigns of Spain and France, during the time the country was held by them, the property having been especially dedicated to public uses; by the cession, the same became vested in the sovereignty of the United States, subject to those uses; and the use, not destroying or affecting the right of the United States to the land, passed, by the act of congress incorporating the city of New Orleans, to the corporation.

The statement of facts on the part of the corporation, makes a complete case of them. The land claimed by the United States, appears to have been designated for the use of the city, ever since it was founded. The plans referred to, show that there was always an open space fronting on the river, and the uses of it were only such as were consistent with the public use. A custom-house; a parade ground for the military; barracks for the soldiers, were erected upon it. These were permitted; but they did not destroy the title of the citizens to it, nor did such uses convert it into public domain. The easements thus permitted might have been revoked. It is stated, that a market-house, erected of wood, was taken down by the corporation and replaced by one of brick. The city of New Orleans was bound to support the exterior levee, and this has always been done at the expense of the inhabitants. This expense has always been considerable. The United States have never been called upon to do this.

All the facts of the case show, that the situation of the streets of New Orleans; the general conformity of the plan to the plans of other French cities; and the principles of the civil law, which apply in such cases, have full force in the present question. In the 19th division of the statement of facts, it appears, that in 1724 and 1728, plans of the city were made, on both of which the ground now claimed of the United States is designated as *quays*. One of these plans, that of 1728, has been recently obtained from France. It shows such a dedication to public uses as brings the case within all the principles established by this court in the *Cincinnati Case*, and in the *Pittsburgh Case*, reported in 6 Peters. The binding force of such plans is shown in 1 Stark. on Evid. 169. *The ownership of [*674] property may be public, and the use private. The decision of this court in the case of the *Dartmouth College*, established this. If it should be decided, that the United States might have a custom-house on this ground, or a parade-ground; this will not sanction a claim to the property, or a right to sell it for the benefit of the United States. Have the United States a right to divert the property from the use for which it was dedicated, to enrich their treasury? It appears, that the dedication of land to public uses is an estoppel of all subsequent claim to it, as well by the civil law as by the common law of England. French Pandects, art. 15, 28; 3 Mart. (La.) 296, 303-4; 11 Ibid. 680.

The sovereignty of Spain over this property existed before the cession, for the sole purpose of enforcing the uses to which it was appropriated. This right, and the obligations imposed upon it, became vested in the state of Louisiana, and did not continue in the United States, after the state was formed. Acquiesced in by the United States, under the treaty, in the first instance, it necessarily afterwards passed to the state. The United States cannot now enforce this use, and could not take the quay and dispose of it; and unless this can be done, there is nothing to support this action. The

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preservation and the enforcement of the use must be by the state government. By the act of congress incorporating the city of New Orleans, all the use of the property became vested in the city.

The petition presented to the district court does not recognise any trust. It asserts a full and sovereign right to the whole land; and if this court shall confirm the decree of the inferior court, the United States will hold it discharged from all trust.

Butler, Attorney-General, for the United States.—The nature and object of the suit have been misapprehended by the opening counsel. It is not a suit in equity. The suit was commenced by petition and not by bill; process of *subpoena* was not prayed; nor were any of the proceedings in the proceedings in the cause on the equity side of the court. The object of the suit was to prevent the city corporation from selling the premises in question; and not, as the counsel supposed, to recover possession. The United States were themselves in possession; and the action brought by them (which was in many respects analogous to an injunction bill) is well known to the civil law as a "prohibitory interdict; the nature and purpose [of which are well explained in Livingston's answer to Mr. Jefferson, in the case of the New Orleans Batture. 5 Hall's Law Journ. 270-73.]

The learned counsel for the city is also mistaken in supposing, that in order to maintain the decree appealed from, the United States must show that they have an absolute title to the lands in dispute, freed from any servitude or public use; such a title as to authorize the government to sell these lands, and to apply the proceeds at pleasure. The particular nature of their title was not stated in the petition. The averments were, no doubt, broad enough to cover the absolute ownership of the premises; and in one of the aspects in which he should present the case, he would endeavor to show, that the United States were the absolute owners; but it did not necessarily require such a title, to maintain the petition. On the contrary, the averments contained in it would be sufficiently satisfied, and the plaintiffs would be entitled to the relief sought, if it were shown, either—1st. That the United States held the absolute ownership; or, 2d. That they held the title to the soil, though charged with a servitude for the benefit of the inhabitants of the city, or of the public generally; or, 3d. That the United States were entitled to a servitude in the lands, the title to the soil being in the city corporation; because in either of these three cases, the attempt of the city to dispose of the lands in absolute ownership, to individuals, without the consent of the United States, was an encroachment on their rights. The prohibitory interdict was an appropriate remedy for either of these three cases; and if it should appear, that either had been made out, then the injunction by which the city was prohibited from selling these lands as private property, for its own exclusive benefit, was properly made perpetual.

The decree of the court below does not specify the particular ground on which it proceeded; and no explanatory opinion was delivered by the judge. If it can be shown, that the United States have any such title in the soil, or to the use of the premises, as to make it inequitable for the city to proceed in its attempt to sell, then the decree must be affirmed. If this court should be of opinion, that only a qualified title is shown by the United States, it could say so, in its decree of affirmance; and thus protect the rights of all

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other parties. The real question in the case, therefore, is, have the United States such right in the soil, or to the use of the premises, as to *entitle them to a decree prohibiting the absolute sale by the city corporation? In support of the affirmative of this question, it is contended:

I. That the corporation of New Orleans has no title whatever to the soil, nor to the use of the vacant lands in dispute; but that under the treaty of cession of 1803, the United States became, and yet are, absolutely entitled to the same. Although it is sufficient for the plaintiffs, in order to retain their injunction and decree, to show that they have a qualified interest in the soil or in the use; yet it is obvious, that to entitle the city corporation to proceed with the proposed sales, it must show a complete title, free from any public use. In this view of the case, the question of title becomes a material one; and it is desirable, on many accounts, that it should be decided in the present suit.

That the corporation has no title to the soil or to the use of the premises in question, was expressly decided in 1833, by the supreme court of the state of Louisiana, in the case of *De Armas v. New Orleans*; being the same case subsequently brought by writ of error before this court, and dismissed for want of jurisdiction. (9 Pet. 224.) The plaintiffs, as grantees of the heirs of one Bertrand, claimed a lot included within the original limits of the quay, granted by letters-patent to those heirs, pursuant to the act of congress confirming their claim, which was founded on the entry and possession of Bertrand, in 1788, under a permission given by the Spanish governor. The corporation of New Orleans having asserted a claim to the lot, as part of the quay, Cuculla and De Armas instituted a suit in one of the district courts of the state of Louisiana, for the purpose of establishing their title, under the United States, and the district court decreed in their favor, which decree was affirmed, on appeal, by the supreme court. The corporation contended, first, that the whole vacant space was their property; and secondly, that it had been irrevocably destined to public purposes, when the town was established, and thereby for ever rendered inalienable even by the sovereign. On the last point, the judges differed, Chief Justice MARTIN holding in the affirmative, but being overruled by the other judges. On the question of title in the corporation, the judges were unanimous. Judge PORTER examined the point at large, and Judge MATTHEWS concurred with him; and though Chief Justice MARTIN dissented from the judgment, he *did not controvert the reasoning of Judge PORTER [^{*676} in this respect. It is shown by Judge PORTER, that according to the French law, a city, or other community, can only acquire a title to land, or to the use of land, by letters-patent from the king. He also shows, that according to the Spanish law, cities and other communities could not acquire title to the soil, except by grant from the crown; though they might acquire title to the public use of land, by grant, purchase or prescription. The opinions of Judges PORTER and MATTHEWS, in this case, notice all the prominent facts now relied on by the city, and answer almost every suggestion in the opening argument. Judge PORTER shows that the case is distinguishable from that of the *City of Cincinnati v. White*, 6 Pet. 431, by the circumstance, that the lands were not set apart for public use by a private individual, but by the sovereign; and more especially, because the questions were to be decided, not by the com-

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mon law, but by the laws of France and Spain, which were in force prior to the cession. It had been affirmed in the opening argument, that the United States had no greater or other power over the quays, than they had over the streets ; and the counsel for the United States had been challenged to show a distinction between the two cases. This call had been answered by Judge PORTER, in the following words : "The streets of a town are, no doubt, what is denominated in our law, public places, and they are protected from change and alienation, by all the rules which apply to things of this description. But the power of the grantor over them, even if he should be the king, is, in my opin'on, much more limited, than that he possesses over other things of the same kind. So long as the town remains unincorporated, and he retains the power of regulating its police and government, by laws and ordinances, he may modify, abridge or enlarge the streets, but he cannot deprive the inhabitants of the use of them ; and for an obvious reason. Streets are indispensable to the enjoyment of urban property. Without them, a town could scarcely be said to exist ; the inhabitants of it would be as prisoners in their own houses. It may, therefore, be readily admitted, that the sovereign power of no country could deprive the owners and occupants of lots and houses of things indispensable to the use and enjoyment of the property sold or conceded, without violating the plainest dictates of justice, and the general principles of law, applicable to all other *cases of the same kind. But its inability to do so, would not proceed from their being destined to public purposes ; but because, without them, the property granted could not be enjoyed. Just as, on the same principle, an individual who granted a portion of his land, which could not be reached but by passing over other portions of it, would be considered as having conceded to the grantee, the right of way over the part retained. It is a well-settled principle, that whenever an individual or the law giveth anything, there is impliedly given, at the same time, whatsoever is necessary to its enjoyment. The limitation, therefore, contended for on the power of the sovereign, over streets, may be well conceded, to the whole extent pressed in argument, without at all affecting his authority, or his rights over vacant ground not proved to be necessary to the use of private property." The same opinion shows also, that even admitting that the vacant space in question had really been dedicated to public use, by the king of France, that such dedication was not irrevocable, nor the land rendered inalienable ; but on the contrary, the dedication might be revoked, and the land alienated by the sovereign. Judge PORTER also arrives at the same conclusion, as to the want of title in the city, on other grounds. He shows, that, unless words can make or change things, no part of the ground left between the city and the river, can be regarded as a quay, save that which was prepared for the reception and discharge of vessels, by the creation of the levee or artificial embankment. And admitting that this space was really a quay, he then argues, that not only so much of it as is actually necessary to the loading and unloading of vessels, is properly to be regarded as public. Thus far Judge PORTER had chiefly considered the case, on the law of France. He then examines the law of Spain, which brings him to a result equally fatal to the claims of the city. Judge MATTHEWS, who concurred in this opinion, supported some of the points above referred to, by additional arguments and authorities. This decision, though not obligatory on this court, is entitled

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to the greatest respect. The case turned on the French and Spanish laws, with which this court is not particularly conversant. The state judges were familiar with those systems, and as they must, no doubt, have been disposed to incline, on all doubtful questions, in favor of the city, their decision may be regarded as of the highest authority. It should also be mentioned, that the same decision, in effect, *though the cases were different in their [*679 circumstances, had been previously made by the supreme court of Louisiana, in the cases of the grants to *Menzinger* and *Liotaud*, whose claims before the commissioners are also among the proofs in this case. 3 Mart. (La.) 296; *Cabot v. Blanc*, 5 Ibid.

Independently of the decisions of the local tribunals, it is submitted, that on the facts stated in the record, it is apparent, that the city has no title. No law of France or Spain, nor any grant from either, nor any documentary evidence of any kind, is introduced or appealed to by the city, for the purpose of showing that the ground in controversy had ever been expressly granted to the city. The right of property depends on the state of the title in October 1800, when the country was retroceded by Spain to France; and in the absence of any written declaration of the right to this property, the presumption of law is, that it belonged, at that time, to the sovereign, as a part of the national domain. The circumstances appealed to by the other side, for the purpose of overcoming this presumption, and showing title in the city, must be referred to the laws by which the territory was governed, prior to 1800; that is to say, the laws of France, from the settlement of the country until 1769, when the Spanish laws were put in force, and the latter, from that time.

The counsel for the city, in the pamphlet handed to the court as a part of the opening, whilst they admitted, that the city had never received a grant from the French crown, yet contended, that by the designation of the premises on the plans of the city as a *quay*, and by the possession and enjoyment set forth in the case, the land was as completely separated from the domain, and as clearly vested in the inhabitants of the city, as if there had been a formal grant from the French crown. In answer to this, the attorney-general contended, that the most that could possibly be made of the designation on the plans, and the other facts relied on by the city, was, that the vacant space in question had been dedicated to public uses—they did not even begin to show a title in the corporation. By the French law, as it existed at the time the city was laid out, and from that time until the cession to Spain, quays and other public places in cities, belonged to the crown, as a part of the public domain. Domat's Public Laws, book 1, tit. 6, § 1, art. 7; Encyc. Math. Jurisprudence, art. Domaine. As to the extracts from the Partidas and other Spanish laws, they *only show [*680 that cities might, by the law of Spain, hold commons and other public places; they do not prove that cities, under that law, could hold the absolute titles in those places, nor any title whatever in the soil; and, above all, they prove nothing as to this particular case.

The law as to increases of land formed by alluvion, was, no doubt, correctly stated by the opening counsel; but it could not help the city in the present case. The increase, by alluvion, was on the outer side of the levee, which had been greatly widened by it; whereas, the ground now in controversy, is wholly on the inner side. Besides, the increase by alluvion belongs

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to the owners of the soil to which it is added ; and as the city corporation has been shown not to be the owners of the soil, they have no title to the increase, not even to the use of it. Livingston, in 5 Hall's Law Journal, p. 120, 150, 172, 188. Nor is there any hardship in this; because the levee has been widened by revenues granted to the city by the crowns of France and Spain.

Title by prescription is also set up. But by the French law, there can be no title by prescription against the crown, in any case, unless it be immemorial. *Alard v. Lobau*, 3 Mart. (N. S.) 293. And such things as are destined to common or public use, such as banks of rivers, &c., cannot be acquired by prescription. Domat's Civil Law, b. 3, tit. 7, § 5, art. 2. And though, by the Spanish law, cities and towns may acquire, by prescription, a title to the use of land, for commons and other public places, they cannot acquire an absolute title in that way. But there is no such long-continued and uninterrupted possession here, as is required by the Spanish law, to constitute a title by prescription. (For the rules of the Spanish law on this subject, see Institutes of the Laws of Spain, quoted in White's Compilation, p. 70.)

The opening counsel had contended, that if the right of dominion, the title, did really remain in the sovereigns of France and Spain, whilst they owned the country, yet that the title was held by them subject to public uses ; and that by the cession to the United States, and by the incorporation of the city of New Orleans, by the territorial legislature, under the authority of the United States, the title and dominion, subject to such public use, became vested in the city corporation. The answer to this argument will be found in the act of incorporation itself. It gave the corporation a capacity to acquire lands, according to our law of corporations ; and it vested in them *all the estates, whether real or personal, which there-
*681] tofore belonged to the city of New Orleans, or were held for its use, by the *cabildo*, under the Spanish government, or the municipality, after the transfer of the province to France, and which had not been legally alienated, or lost, or barred ; but it gave to the corporation no new title to the land in question. The territorial legislature, indeed, had no power to grant such a title. The act of the 26th of March 1804, which organized the territorial government, expressly declared, that the governor and legislative council should have no power over the primary disposal of the soil. The act of incorporation, therefore, merely confirmed to the new corporation the old title, and we are, therefore, necessarily turned over to the former question.

The attorney-general next contended, that the absolute title to the premises in dispute had been vested in the United States, by the treaty of cession of 1803. This was the conclusion of a majority of the court in the case of *De Armas v. New Orleans*, before cited ; and there are in the present record some evidences of title, not presented in that case ; and various arguments applicable to this point, not noticed in the opinions of Judges PORTER and MATTHEWS, may also be suggested. Title to land in Louisiana, as well as in other parts of this continent, was founded on discovery. *Johnson v. McIntosh*, 8 Wheat. 593. The whole soil, subject only to the right of Indian occupancy, was treated as a part of the national domain. In September 1712, Louis XIV. granted to Anthony Crozat, the commerce

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of Louisiana, for fifteen years, with the mines, &c., in perpetuity. 1 Martin's History of Louisiana 178; White's Compilation 159. This grant extended the edicts and ordinances of the realm, and the customs of Paris, to Louisiana. In August 1717, Crozat surrendered his grant to the crown, and in the same year, the commerce and government of Louisiana were granted to the Western Company, for twenty-five years. The lands of the territory were also granted them, in perpetuity. 1 Mart. 198-9. The site of New Orleans was selected 1718, by Bienville, who had been commissioned as governor by the Western Company. Ibid. 204, 244. The designation of the *quay*, and the general plan of the city, was made under the authority of the Western Company. But though that company held the title in all these lands, at that time, this does not alter the case. They represented the sovereign, not only in their capacity to make grants of land, but also in the regulation of commerce. In designating the *quay*, they acted in the *latter character, as well as in the former; and the case must, therefore, stand on precisely the same ground as if the city had been laid out by the crown, at a time when the whole title was in it. The Western Company surrendered their grant to the king, in January 1782 (1 Mart. 287), and the French crown was thus re-invested with its original title, and all lands not previously granted were re-united to the public domain, and so continued until 1789; when the secret treaty made in 1783, by which Louisiana was ceded to Spain, was promulgated, and the territory delivered to the Spanish authorities. 1 Mart. 329; 2 Ibid. 2. The premises in question having never been granted to the city, and being a part of the public domain, at the time of this treaty, passed by it to the crown of Spain, by which it was held as a part of the domain belonging to that crown, until 1803, when the treaty of retrocession, made at St. Ildefonso, on the 1st October 1800, by which Spain ceded Louisiana to the French republic, was carried into effect. 2 Mart. 182. The title to these premises being in the king of Spain, and not in the city of New Orleans, at the time of the execution of the treaty of St. Ildefonso, it passed to the sovereign of France, as a part of the national domain; and under that treaty, the French republic acquired, to use the language of their cession to us, "an incontestable title to the domain, and to the possession of the said territory." The title thus acquired by France, together with the sovereignty of the country, passed, by the treaty of cession of 1803, to the United States. The second article of this treaty declares, that in the cession are included "the adjacent islands belonging to Louisiana; all public lots and squares, vacant lands, and all public buildings, fortifications, barracks and other edifices, which are not private property." This enumeration was probably unnecessary, but seems to have been inserted from greater caution, and as if with a view to this very question. It is evident, from the language of this article, that public lots and squares in cities were not regarded as the property of the cities, but as the property of the crown; and as there were no such public lots and squares within the territory of Louisiana, except in the cities of New Orleans and Natchez, public places in those cities must have been specially intended by the framers of the article. The vacant space now in controversy, was a public lot or square, within the meaning of the treaty; and as it has been decided by the highest court of the state of Louisiana, not to be the property of the city, it necessarily passed to the United States.

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*It was contended in the opening, by the learned counsel for the city, that even admitting that the sovereigns of France and Spain had the title to, and the control of these premises, and that the same passed to the United States by the treaty, it did not necessarily follow, that the United States yet retain such title and control ; and it was argued, that on the creation of the state of Louisiana, that state became invested with all the title and control of the former sovereigns. This argument was attempted to be supported, by the third article of the treaty of cession, and the act of admitting Louisiana into the Union ; and it was said, that if such was not the case, the inhabitants of the ceded territory would not possess all the rights and advantages of citizens of other states ; nor the state be placed on an equal footing with the other states. But the third article of the treaty relates only to the rights which are to be enjoyed by individuals ; and the act of congress of the 26th of February 1811, authorizing the formation of a state government, required as a condition, that the people of the proposed state should for ever disclaim all right or title to the waste or unappropriated lands within the territory ; and that the same should be and remain at the sole and entire disposition of the United States. This condition was acknowledged in the state constitution, and reiterated in the act of the 8th of April 1812, by which the state was admitted into the Union.

The ownership of the premises by the crowns of France and Spain as a part of the public domain, and the consequent title of the United States, are supported by many acts of ownership, and by frequent recognitions of the city authorities ; the most important of which are enumerated in the agreed statement of the facts proved, and of evidence offered by the plaintiffs. It was said by the opening counsel, that these were not evidences of title, but only evidence of the exercise of a claim of title, and of acquiescence by the city authorities. That remark was a mere sophism ; for what is evidence of the exercise of ownership, especially, when acquiesced in by the adverse party, but evidence of title ? Proofs of this sort are the very highest evidence of title ; and they, therefore, deserve the particular attention of the court. In the present case, the acts of ownership on the part of the crown, and of acquiescence on the part of the city authorities, commence from a very early date.

Among the proofs produced by the corporation, are the papers relating to fourteen sales, and other documents ; which were introduced to prove that the houses in the front row of the city were *described as *684] bounded in front by the *quay* ; and also, to show that the city lots extended no farther. Among these sales, there are several lots on the quay; not bounded by the quay; but, as would seem from the descriptions, actually situated on it, and forming part thereof. The grant to Broutin is for a lot "on the wharf," to be held by him and his heirs and assigns, as his own property ; subject to the services which may be imposed by his majesty by reason of his domain ; and on certain conditions to be performed by him, "under the penalty of the said lot being re-united to his majesty's domain." Barracks were erected on the premises, by the French government, before the year 1757 ; and the troops were frequently exercised thereon. The commercial use of the quay was also under the authority, and for the benefit of the crown, or those who represented it, as contradistinguished from the city. From 1769 to 1803, there are various acts of ownership on the

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part of the Spanish crown ; most of which also involve a recognition by the city authorities of the title of the crown. The barracks erected by the French government, and the use of the premises as a parade ground, were continued. On the 22d of February 1770, Governor O'Reilly, acting in the name, and with the authority of the king, granted to the city, among other things, a tonnage duty to be paid by vessels and boats coming to the city, to be appropriated to the reparation of the levee. Several imperfect grants, and two complete titles were also made by the Spanish governor, as the representative of the crown, between 1788 and 1803, of portions of the quay ; which grants, after the cession, were confirmed by acts of congress. [The attorney-general here reviewed the cases of Magnon, Chessé, Bertrand, Urtubuise, Mentzinger and Liotaud ; and laid great stress on the grants by the Baron de Carondelet to the two latter ; and on the allegations in their grants, that the lots granted were part of the royal lands, &c. As to Magnon's case, he insisted, that the opinion of the attorney-general merely spoke of the proposed grant, as a thing that might be disagreeable to the city council ; but not as an act that would violate their rights.] In three of these cases (those of Mentzinger, Bertrand and Liotaud), the title thus derived from the United States was held valid by the supreme court of Louisiana. Prior to 1793, the Spanish government erected a custom-house and a tobacco warehouse on the premises ; the former of which existed at the period of the cession to the United States, and has since been kept up by them.

*The use thus made by the governments of France and Spain, was all that the nature of the subject and the circumstances of the times required or admitted ; and the fact that some small buildings were erected by the city authorities, during this period, and that the inhabitants of the city sometimes used it as a common, are not inconsistent with the title and ownership of the crown. There is no instance, from the laying out of the city to the present day, until the attempt which led to the present suit, of any pretence on the part of the city authorities that they were capable of granting these lands ; and until the late cases in the state courts, they never alleged that the crowns of France and Spain, before the cession, and the United States since, had not the power to make such grants.

The acts of the parties, after 1769, show beyond controversy, that in the judgment of all the Spanish authorities, the land in question belonged to the crown, and not to the city. And even were it proved (which is not admitted), that according to the French law, the ground between the lots appropriated as private property and the water was all called *quay*, and was the property of the city authorities ; yet if the government of Spain, after the country passed under that jurisdiction, deprived the city of this property, and held and used it as the property of the Spanish crown, this court will not now revise the decision of the Spanish tribunals, and inquire whether the title to this ground was justly or unjustly taken from the city authorities, and vested in the crown. But they will recognise and support the title, as it existed and was recognised by the proper tribunals, at the time of the cession to the United States. And as it is not pretended, that any change in the title took place between the times of the cession to France, and the transfer by France to the United States, the rights of the United States, and of the corporation, must be tested by the state of the title, as understood

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and maintained by the Spanish authorities, at the time they ceded the country to France. For if the property originally belonged to the corporation, or municipal authorities, and was unjustly wrested from them, and converted to the use of the Spanish government, as public property, the courts of the United States will not revise and reverse decisions which the despotic character of the Spanish government authorized and sanctioned. Those decisions may have been made in direct violation of the principles which regulate and protect private property, according to our institutions: but they are, nevertheless, binding on the parties affected by them.

*686] *Since the cession to the United States, and the incorporation of the city, the former has claimed, with the acquiescence of the latter, the full ownership of these premises. In 1806, the corporation presented, under the act of the 2d of March 1805, to the register and commissioner of the eastern land-district of the territory of Orleans, a claim to certain lands in the vicinity of the city, alleged to have been granted, at the time the city was established, to the inhabitants of the city, to be used as a common for ever, and prayed for their confirmation. This claim seems to have been understood by all parties, as embracing the land now in controversy, as well as other land. The board rejected the claim as to certain lands occupied for fortifications, and also as to all "lots and vacant parts of land between the said fortifications and the city, and within and in front of the city, between Levee street and the river." This decision was acquiesced in at the time; and if the premises in question had been as clearly embraced in the petition, as they are in the decree of the commissioners, the decision would have been conclusive. It may be said, that the premises now in dispute were not embraced in those proceedings; and if this be so, the fact furnishes strong proof that, at the time the claim was made, the city authorities did not suppose they had any title to these lands. Had they then claimed any such title, they would, no doubt, have preferred a claim for the confirmation thereof, under the act of congress of the 2d of March 1805.

In 1812, the city council passed a resolution, directing an application to be made to congress, for the grant of a lot on the *quay*, to be used for the erection of a fire-pump; in which resolution, they expressly admitted, that the vacant space between the river and the front line of houses, could never be sold or rented to private individuals, or disposed of, except for objects of public utility; and the whole resolution, and the application made to congress, proceed upon the admission, that the government of the United States was alone competent to make a grant of any portion of these premises. Pursuant to this application, congress, by the act of 3d April 1812 (2 U. S. Stat. 700), granted to the corporation of the city of New Orleans the use and possession of a lot between Levee street and the high road; with a proviso, that if the same should not be occupied for the purposes indicated, within three years, or should thereafter cease to be so occupied, for the term of three years, the right and claim of the United States should remain unimpaired. The act of the 20th April 1818 (3 Ibid. 465), "authorizing the *disposal of certain lots of public ground in the city of New Orleans and town of Mobile," and the act of 30th March 1822 (Ibid. 661), supplementary thereto, were both passed at the solicitation of the city corporation, and both contain similar recognitions of the title of the United States. The act of the 28th February 1823 (Ibid. 729), in relation to the lot on which the navy

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store-house is situated, and which is thereby granted to the corporation, admits of the like remark. The act of the 21st April 1806 (2 Ibid. 401), granting to the corporation of the city of Natchez, the right of the United States to all the land lying between the Front street and the Mississippi, on condition, that the premises should neither be cultivated nor occupied by buildings, but that it should be planted with trees and preserved as a common, may also be referred to, as evidence of the general understanding, that the title in vacant places of this sort had, by the treaty of cession, been vested in the United States.

It is also matter of public history, of which the court will take judicial notice, that during the pendency of the present writ of error, the corporation of New Orleans has petitioned congress to grant to it the very lands now in controversy, and that the argument of the cause was delayed for one or two terms, for the express purpose of enabling the corporation to present this application, and to obtain a decision thereon.

In accordance with these admissions, has been the actual conduct of the parties, ever since the cession to the United States. In 1819, the United States erected on the *quay* a building, which is yet occupied by them as a custom-house and court-house; and they also caused the same and the adjacent grounds to be inclosed with a fence; and if they have not had the exclusive use of the remainder of the premises in controversy, neither has there been any such use on the part of the corporation. Under these circumstances, the possession follows the legal title, and was, therefore, in the United States, at the commencement of the suit, as alleged in their petition.

II. If the corporation of New Orleans has any legal interest in the premises, it is not such an interest as can authorize the absolute sale of said premises, in lots, to individuals; because the interest of the city is, at most, a mere servitude, for the benefit of the inhabitants of the city, or of the public, generally, whilst the title to the soil is vested in the United States. In discussing the first point, it has been shown, that the corporation of New Orleans had no title to the soil; and on the most liberal construction of the facts, and with every disposition which might be felt to maintain and extend their interests, it would seem to be impossible to go further than the opinion of Chief Justice MARTIN, who merely contended, that the quay had been irrevocably dedicated to public use, for the benefit of the inhabitants of the city and the public at large, and that the property was, therefore, put *hors du commerce*. Indeed, the greater part of the opening argument had been directed to this point; and if nothing more than this has been established, then it is plain, that the decree must be affirmed. Suppose, the lands to have been dedicated to public use, and the city corporation to have the legal title to such use, yet the fee, charged with this public use, must have remained in the crowns of France and Spain and from them must have passed to the United States, who, as the present owners of the soil, have a right to enjoin the city corporation from proceeding to sell, for its own exclusive benefit. Supposing the city corporation to have the legal title in the servitude; it is plain, that this does not authorize it to sell the whole estate, appropriating the proceeds to its own use, and that too, without the consent of the owners of the fee. On the contrary, according to the rules both of the civil and common law, if the property ceases to be used for the purpose to which it has been dedicated; if the

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servitude is abandoned or extinguished, the whole estate reverts to the owner of the soil, whose title then becomes absolute. In such case, the original owner, or those who have succeeded to his rights, will hold the land freed from the incumbrance of the servitude.

III. If the corporation has any title to the soil, then the same is charged with a servitude, held by the United States for their own use, and for the use of the public generally. If, upon any ground, it should be held, that the title to the soil has passed to the city corporation, then, as it is admitted and contended by the counsel for the city, that the lands were originally designed for public use as a *quay*, the question will arise, by whom is this servitude held? According to the law of France (as already shown), all public places, including *quays*, are held by the crown, for the use of the public. This title passed to the Spanish crown, and was retained by it, until retroceded to the French republic. By the treaty of cession of 1803, this servitude passed to the United States; and until they grant it to the state, or to the city, they must continue to hold it, provided they have a capacity to do so, under the constitution of the United States. That they had such [689] a capacity, during the *existence of the territorial government, can not admit of doubt; and they must now have the same capacity in this respect, in regard to Louisiana, which they possess in regard to the other states. Under the powers to lay and collect imposts, and to regulate commerce, they may undoubtedly acquire and hold wharves, store-houses, &c. And in a great commercial city like New Orleans, what constitutional difficulty is there to prevent them from holding, for the purpose of facilitating the collection of imposts and the regulation of commerce, the use of a tract like the *quay*? It might not be necessary or expedient, in ordinary cases, for the United States to acquire a servitude of this sort in so large a tract; but the power to hold such a title, cannot depend on the extent of the tract. Besides, although the territories adjacent to the Mississippi river have been formed into states, the United States yet have an interest in the navigation of the Mississippi; and have so lately as 1824 (6 U. S. Stat. 318-19), granted lands to the parishes of Point Coupee and West Baton Rouge, for the purpose of keeping up levees on the bank of that river. It is, therefore, submitted, that the servitude in these lands may be well held by the United States, for the benefit of the citizens of the United States, and of all others who may wish to use the same for the purpose of a *quay*.

Livingston, for the appellants.—It has been truly said by the attorney-general, that this is a suit of importance; whether we consider the value of property actually depending on its decision, or of that which may be involved in the principles which the decision may establish. But to the appellants, its importance is far greater than any considerations of pecuniary value could give to it. Decided in favor of the United States, the decree gives them, not only the land contended for in this suit, but all that lying in front of the city. It cuts off from all access to navigation, the second commercial city of the Union; shuts up their streets; renders their wharves useless; and, worse than an invading enemy, invests them with a blockade that their valor can never raise; well, therefore, might the attorney-general call it an important cause. But, happily, importance and difficulty are not synonymous. These fatal results of a decree against the appellants, may, I think,

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be avoided by a reference to two cases lately decided in this court; those of *Cincinnati* and *Pittsburgh*; to which the attention of the court has been already drawn. *The facts are essentially the same in character; or where they differ, they are stronger in our favor. The law by which [*690 they are to be governed, is the same; call it civil or common law, it is founded on the principles of justice, which never vary; and the only difference between the two systems is, that the rules which have been established by the decisions of this court, were, under laws which govern this case, matter of statutory enactments.

Objections have been raised to the form of the action, which it will be necessary to remove, before we examine the merits. It has been said, that the counsel who opened this case erred in calling it a suit in chancery, for the following reasons: it is not so entitled; no process of *subpoena* was issued; and a jury was once impaneled to try the issue of title. This court will not regard the want of form, where it is not essential to the great ends of justice. If the words, therefore, "in equity," are not placed at the head of the record, but the whole scope of the petition is, to obtain an equitable relief, the omission will not be fatal; those words can be no more than a direction to the clerk, on what docket to place the cause. The want of a *subpoena* is supplied by a summons, and the appearance cures all defects of mesne process. As little can the objection avail, that a jury had once been summoned; for feigned issues to try facts are among the ordinary proceedings of courts of equity.

But it is objected, that here the relief prayed for is not equitable, but one given by the common law of the country; that the perpetual injunction prayed for by the bill, and given by the court below, is nothing more than the interdict of the civil law; and authorities are taken from a pamphlet, published some years ago, to prove the position; and that the author of that pamphlet, now the counsel for the appellant, proved, as it is said, conclusively, that a suit commenced in the same form with this, having the same object, and in which the same relief was obtained, was not a suit in chancery. All this is true; but an essential circumstance is forgotten in the statement. The suit in question (*Gravier v. Corporation of New Orleans*) was brought in the territorial court of Louisiana, under the first grade of government; a court, proceeding according to forms, essentially those of the civil law; governed in its decisions by the rules of that law; and consequently, knowing no distinction either in its degrees, or its modes of procedure, between equity and common law. The object of Gravier's suit was, to be quieted in his possession; a relief, which, if the suit had been in a chancery court, would have been *given by perpetual injunction; and [*691 if according to the laws which govern the territory, by the equivalent remedy of a perpetual interdict. The same remedy was given by the territorial court, that would have been given by a court of equity, had the distinction been known to the laws of the country; but it was not known; therefore, the proceeding in that case, was not a chancery proceeding, but one in the ordinary execution of the powers of the court. Here, on the contrary, the suit is brought in a court having chancery jurisdiction; the relief sought is an equitable relief; and it will not surely be required, that authorities should be cited, to prove, that whatever may be the laws of the state in which a court of the United States is situated, that court has equity jurisd-

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diction ; and although the courts of such state might give relief, according to the forms of the common law, in cases strictly of equity jurisdiction, yet those of the United States are bound to class them according to the nature of the remedy sought for.

The reference to the pamphlet, from which the argument has been drawn ; the flattering terms in which the attorney-general has been pleased to speak of it ; and the possibility that, in looking at it, the court may recur to other parts than those immediately relating to the question before them, oblige me to ask their indulgence for a single observation ; irrelevant, it is true, to the case, but which I am happy to find an opportunity of making. The pamphlet was written under circumstances, in which the author thought, and still thinks, he had suffered grievous wrongs ; wrongs which he thought, and still thinks, justified the warmth of language in which some part of his arguments are couched ; but which, his respect for the public and private character of his opponent, always obliged him to regret, that he had been forced to use. He is happy, however, to say, that at a subsequent period, the friendly intercourse, with which, prior to that breach, he had been honored, was renewed ; that the offended party forgot the injury and that the other performed the more difficult task (if the maxim of a celebrated French author is true), of forgiving the man upon whom he had inflicted it. The court, I hope, will excuse this personal digression ; but I could not avoid using this occasion of making known, that I have been spared the lasting regret of reflecting, that Jefferson had descended to the grave, with a feeling of ill-will towards me.

The opening counsel has also been supposed to have fallen into another error, when he stated, that the object of the suit was the *recovery of ^{*692]} the absolute ownership of the property for the United States. That he has not erred, is evident, from the words of the petition ; they claim the dominion and possession, the union of which amounts to absolute ownership.

It is true, as has been argued, that there are cases in which the court may modify the decree, according to the circumstances which are proved ; but this can only be, when the proof is in conformity with the case alleged ; when it is not, it destroys the force of the rule that the *allegata* and *probata* must agree ; and as a consequence, that the decree must conform to both. Here, it is supposed that the court may either decree the property in full dominion to the United States, or that they may establish the property in them, with a servitude to the city, or give the property to the city with a servitude to the United States ; but neither of these kind of titles are put in issue, neither of them are alleged in the pleadings ; and, as will be shown, neither are proved by the evidence. They cannot recover a servitude, by asking for the fee ; and if the land in the hands of the corporation is subject to the servitude of a common use, in favor of all the inhabitants of the United States, the government of the United States cannot enforce that use, by a suit in their name.

The demandants, then, in this, as in all other cases, must prove their case, and prove it as stated. They allege dominion and possession ; both must be proved, if they can have the relief prayed for, viz., a perpetual injunction to quiet possession. But if they do not show actual possession, how can they be quieted in it ? If they do not show property, there can be no equity in their demand ; for chancery will never interpose in favor of an

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illegal possession : actual possession has not been attempted to be shown, and an actual adverse possession for more than 100 years is expressly admitted. No position can be clearer, than that, for this defect of proof alone, the bill must be dismissed ; and I might add, if it were necessary, that equity will not interfere to quiet a possession, until after the title has been settled. But we do not desire a decree on this point, which would not put an end to the controversy. We are prepared to show conclusively, that the United States have no title to the land, or to a servitude on it ; and that the whole title is vested in the defendants, subject to uses, for the observance of which they are amenable to the laws, to the courts, and to the authorities of the state exclusively.

*I. The title of the United States. This rests on the second article of the treaty ceding Louisiana. That gives to them the dominion of [*693 the province of Louisiana, and enumerates as included in the grant, public squares, vacant lands, &c., not private property. The general transfer would have been sufficient to invest the United States with the sovereignty of the country. But to show that no right to the property contained within the limits of the cession was retained, the enumeration of vacant lands, public squares, &c., is made. Now, in this enumeration, the grantor cannot be supposed to give more than he had ; therefore, if the premises are included in the description of public squares, can it be supposed, that he intended to convey, or could convey, to the United States, that which they claim ; not only the dominion (which supposing it to be the sovereignty only, and which no one in his senses would deny), but also possession and property in that which had been dedicated to public use ? The term public square, by its very name, proves that it is a place of that description not a domain subject to be disposed of by the sovereign. But that there might be no room for doubt, no contradiction between this part of the treaty and that which secured the inhabitants in their rights and property, the restriction is added, that that only was conveyed which was not private property. The terms of the treaty, then, gave no title to the premises ; and to succeed, the plaintiffs must prove that they were vacant lands ; but these terms are well understood, and by decisions of this court, have been adjudged not to mean property in a town ; and by the admission in this case, the property in question is acknowledged to have been in the use and occupation of the inhabitants of the city, ever since its foundation.

Failing in the attempt to bring the case within the bounds of the treaty, the United States have recourse to a decision which it is thought secures it to be within its spirit. The decision of the supreme court of Louisiana is relied on as decisive, if not binding, as authority ; conclusive as authority, and convincing as argument. It will be examined in all these points of view, with the respect due to the learning of the judges who pronounced it, which is acknowledged to be great ; but at the same time, with the freedom that duty to my clients requires. It is not contended, that we are concluded by this decision. It was not made between the same parties, and although for parcel of *the lands now in dispute, was not given on [*694 the same evidence ; and these circumstances derogate much from it, considered only as a precedent. There are others, which, when properly considered, weaken its force, even as argument.

This court has frequently expressed its respect for state decisions, and

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its disinclination to oppose them ; but as their reasons are understood, they will give them effect under the following circumstances : 1. Where disturbing them would unsettle titles *bond fide* acquired. Here no such effect would be produced ; the few claims on this property having undergone legal investigation, and being settled by decisions that do not admit of reversal. 2. The second requisite is, that the state decisions have been uniform. In this, the case of the United States is remarkably defective. Several decisions have taken place in the supreme court of the state, prior to that of *De Armas*; in all of which, as I shall show, opinions have been given directly at variance with those established in that case.

The first of these is, *The Corporation v. Gravier*, 11 Mart. 625, of which these were the circumstances : Gravier had laid out his plantation into a suburb, and made a plan, on which he had laid out a square, on which he attempted afterwards to build ; he was opposed by the corporation ; and the court decided, that the designation on the plan was a sufficient dedication to public use, to prevent any exclusive appropriation being made of it by the former proprietors. The next is found in 8 Mart. 303. In that also, we have the authority of MARTIN (one of the judges), for the fact, that the judges fully recognised the doctrine, that places dedicated to public use could not be disposed of by the crown ; and that if the corporation had then produced the plan of the city, which is in evidence here, the judgment would have been different ; and that if a grant had been made by the crown, it would have been declared void. (See MARTIN's opinion, and the printed case, *Mayor, &c. v. De Armas*, 46.) In the case of *Chabot v. Blanc*, 5 Martin, the same question arose, and the same intimation given by the court, that if a plan of this had been produced, showing the *locus in quo* to have been dedicated to public use, the grant of it by the king would have been declared void.

These two cases were decided before the corporation had discovered the maps, of which authenticated copies are now produced. In both, the court formed their judgment, in the absence of this proof : *in both, they [695] deny the right of the crown to dispose of the property, if the dedication could have been proved by the production of the plan ; in both, the premises were part of the quays now in dispute ; therefore, in both these cases, as well as in the one first cited (*The Corporation v. Gravier*), the principle involved in this case is fully established ; and no decision of a contrary nature, before that of *De Armas*, having been produced, the state authorities, so far from being uniformly against us, are three to one in our favor ; and all these three appear to have been the unanimous opinion of the court ; whereas, this is decided by two judges against the opinion of one.

De Armas's case then stands alone ; the decision must be established or fall, by the comparative strength or weakness of the arguments ; and to support it, we have them, fortunately, at full length. The court will compare those of the dissenting judge (MARTIN) with those of the two judges forming a majority of the court. So much reliance is placed on this case, that it must be closely examined. That part which investigates the validity of the confirmation made by the United States, does not apply here, and need not be examined. The presiding judge, as to the principal point, the property in the corporation, refers to the argument of his associates, with

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whom he agrees, and therefore, touches very lightly upon it. He, however, takes for granted, a fact that is disproved by the admissions in this case, viz., that the greater part of the space denominated a *quay* on the plan, had never been used as such. (p. 59.) He then enters into an investigation of the true meaning of the word *quay*, which he concludes must be an artificial work; and as the space between the houses and the river was natural soil, it could not come within that description. In another part of my argument, I will show, that this philological inquiry is quite useless in this case, and that the learned judge has fallen into an error, which shows that it is so. For, he says, "perhaps, it may be required, that some effect should be given to the word *quay*, inserted on the plan. This may be done, by allowing it in reference to that part of the space on which it is found; which was a *quay*, according to the meaning of the word, as generally received; i. e., the levee which existed on the bank of the river, and the shore between the exterior of the levee and the water." Now, if the place on which the word is written, in all the plans, is to be considered as the quay, then all the definitions which require that it should be an artificial work, are incorrect; for a glance at the plans will show, that wherever it is *written, it is on [*696 the vacant space between the artificial levee and the houses. Another ground on which the learned presiding judge rests his opinion, has, I confess, to my no little surprise, been adopted by the attorney-general. It is, that the United States, because they have the right to establish ports of entry and regulate commerce, have that of regulating quays, as an appendage to the ports, and take upon them the police of wharves in all the states of the Union. The argument of the attorney-general does not, as I understand him, carry this right further than the port of New Orleans; but his doctrine does; for if the right be derived from the constitution, it must apply to all ports in the Union; and the judge expressly goes this length. Of all the constructions of constitutional powers, given to the federal compact, this would be the most dangerous and mischievous in its exercise, and the least founded in the words or spirit of the federal compact. I shall refer to it again, in reviewing the arguments of the learned counsel opposed to me. But grant the right, and it is of no use, to establish the claim of the United States to the title of the land. Let them, if they can, find the authority in the constitution, to make laws for regulating wharfage and drayage, and cleaning the slips and docks. Let them appoint scavengers, and exercise all the jurisdiction which this construction would give them. They are not advanced a step in their claim to the property of the soil, which they must establish, before they can succeed in this suit.

The presiding judge having referred to the opinion of the associate, who concurred with him, for the argument, and that argument having been expressly adopted by the attorney-general, it must be respectfully examined. It divides itself into two branches: to show, first, that the city had no title to the premises; secondly, that the land was not set apart and dedicated to public purposes. The first head is supported by the learned judge, under what I respectfully consider a mistaken view of the law of France. (p. 64.) He lays it down broadly, that by those laws, "a city or town could not acquire right or title to the soil of immovables, or to the use of them, without letters-patent from the king." But the authority quoted in support of this, shows, I think, that by the very fact of establishing a town, the

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right to hold real property is acquired as a necessary consequence. That authority declares, that no one can establish communities but the king ; and [697] adds, "that it is a *consequence of this right also, to permit them to hold real and personal property for themselves." And afterwards, "these communities cannot possess immovables, without the permission of the former." To this there are several answers, all equally conclusive. First, the authority does not require letters-patent, nor any letters whatever, from the king, for the establishment of a town ; it requires his permission only ; and that permission may be proved by any legal evidence whatever. In the present instance, the grant to the West India Company, by whose act the town was laid out, is sufficiently broad to cover such permission. It gives them the land in allodial tenure, with extensive powers to carry on trade, and make establishments, build forts, sell the lands, &c. And the government gave its sanction to the location and plan of the town, by the employment of its own officers and engineers ; and even if that work had been done solely by the act of the company, the plan was ratified, by receiving it into the public archives, and afterwards more fully, when, in 1832, it received the surrender of the charter, and continued the government of the city under the original plan. If, then, the city was laid out, by permission of the king, according to the plan produced, or even if he only ratified such plan, and governed the city by his officers, according to the extent and order of such plan, no other permission was necessary, to vest in the city the premises in question ; for those premises are part of the city, not a distinct property acquired by it ; which, according to the authority, required *lettres d'amortissement*, to enable them to hold it. And the want of this distinction, causes the error in the learned judge's opinion. For can it be doubted, that after giving permission to lay out the plan of a great city, destined, according to the sanguine expectations of the times (expectations more than realized in our day), to be the emporium of extensive commerce, the capital city of an immense region ; after designating on it a spacious harbor, commodious streets, public squares, sites for public buildings, and, above all, that without which the whole would become useless, commodious quays securing to it a free access to the river and the necessary facilities for lading and unlading of merchandise ; is it possible, to suppose, that a separate grant should be required of all these competent and indispensable parts of a city, to enable the inhabitants to enjoy them ? Whatever letters-patent, then, might be necessary to enable communities to acquire real property, after they were created, none could, in the nature of things, be [698] necessary to give them the *enjoyment of those parts of the city itself, which were destined for public use ; such as their quays, streets and squares. Are they not integral parts of it ? and if so, does not the permission to create a city by the king, and, *à fortiori*, his creation of one himself, include this necessary grant ?

But suppose, the grant necessary, and that the premises were not part of the city, is it not necessary to be presumed, that such grant was made ? It is a necessary presumption, when a thing that may be acquired by prescription, has been so long in the hands of the possessor, to give the title. Here, that proof is before the court. Therefore, it inevitably follows, that whether the laying out of the town is, as I suppose it, a sufficient grant, or whether the nature of the property required a separate grant to convey

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it, is immaterial. In the one case, the grant is proved ; in the other, its existence is necessarily presumed. There is on this head alone, an erroneous conclusion drawn from the law of Partidas quoted by the learned judge. That law (tit. 28, 3d Partid.) defines what shall be the common property of the cities, for the use of all the citizens, in contradistinction to that which is held by the magistrates of the city for the common good, but of which the citizens have not the common use ; and after enumerating some of them, as the banks of the rivers, the public fountains, the commons adjacent to the town, adds, "and other such like places as are established and granted for the common use." Evidently referring to the use to which the property is appropriated, not to the manner of acquiring it. The same judge also on this head adds, "that the plans produced in evidence, have never been delivered to the city as a muniment of title." This appears not quite certain. Considering the various changes of jurisdiction that the city and province have been subject to, the two successive conflagrations of the city, and the notorious loss and removal of public documents ; the probability, I should think, would certainly be, that where lots were to be sold, buildings erected, and streets located on the ground, a map or plan must necessarily have been in the hands of some local public officer belonging to the community where these operations were to be performed ; but wherever it lay hid, whenever its existence was discovered, it must have its legal operation. What that is to be, is more particularly examined in the second part of the learned judge's argument, referred to, and adopted as his own, by the attorney-general. *That argument concedes, that a destination to public uses in a plan, [*699] is a sufficient conveyance of the property to that purpose. That this court has correctly placed the setting off of commons to cities, on the same grounds as that of streets and highways ; but, he says, that "although this may be perfectly correct, under the common law, yet the decision cannot apply to a case arising under the French or Spanish law." And he thinks that one example will show this. "The supreme court considers," he says, "that the fee may be in abeyance, until a grantee exists who can accept it ; and that then the grant is irrevocable." This doctrine, he thinks, irreconcilable with the rule of the French law, that no community can have a right to the use of immovable property, without letters-patent from the king ; or with the Spanish law, which recognises no place as common property, for the use of the city, but that which it acquires by grant, purchase or prescription. But are there any such rules in the French or Spanish laws ? I trust, I have shown there are none ; and it is worthy of remark, that on this branch of the argument, the rules are greatly extended beyond the authorities which are supposed to have established them. Thus, the text from Domat says, that the king can permit communities to possess property for their use (*pour leur usage*), not the use of property, but the property itself for their use. Two very distinct things ; one, a right to purchase real property to make their own use of it, the other, to purchase a use or servitude, in the property of another. But the answer to these supposed rules, and to their application, has already been anticipated.

The following part of the opinion is not applicable to the present suit, for it consists solely in an endeavor to establish a right in the king of France, by virtue of his sovereignty and his superintendence of the police of cities, to dispose of the property dedicated to the public use of the citizens ; a right

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which he thinks devolved on the king of Spain, who, as was contended in that case, had made a grant of the land in dispute, part of this quay, to one of the parties in that suit. Now, although I should contest every part of this argument, yet supposing that the kings of France and Spain (by virtue of some regal power, which I contend they never had) could dispose of property which they themselves had made part of the public property of the citizens ; yet they have not exercised it with respect to the premises now in question ; they were handed down to the corporation of New Orleans in regular succession ; and if the sovereignty of the *country came in the same [700] manner to the United States, it came to them unaccompanied by the right of supervision over the police of cities, which the argument supposes the king to have possessed. It came to them limited by the powers delegated in the constitution, and we shall certainly look in vain into that instrument, for a power to interfere with, much less to claim, the property which had once been dedicated to public use. This part of the argument also errs, in stating that the supreme court decided, that merely having a space vacant in the plan of a town, was a sufficient dedication of it to public purposes ; all the blocks in the plans we have produced, lying in the back part of the city, are left vacant ; they are not subdivided into lots ; yet there is no pretence, that they were intended for the use of the city ; they were left so, until purchasers offered for the lots. Something more is required, if I understand the decisions of the court. The space, from its situation, must appear to be necessary for the accommodation of the inhabitants (such as that of the land in question), or there must be some evidence of such dedication, by written, or even verbal, proof ; both of which (situation and written designation), be it remarked, concur in the present case.

A material circumstance, however, has entirely escaped attention in the argument, which renders of no avail all that part of it which is drawn from the prerogative of the king to resume his grant, or curtail any servitude he may have created. The land on which the town of New Orleans was laid out, was private property, not the domain of the crown. It is forgotten, that the province of Louisiana was, after the surrender of the grant to Crozat, granted to the West India Company, to hold in allodial tenure, independent of any feudal rights that might attach to the crown ; that they founded the city, with the assent of the crown, on their own lands ; and when, in the year 1732, they surrendered their grant, the king took only what they had not disposed of. But they could not, it is conceded, alter the plan, so as to deprive the citizens of any advantage it gave them ; therefore, the king, who received only their rights, could not. A word or two on the supposed right of the king. It is founded on this reasoning. There is no doubt, it supposes, that the corporate power may, with the assent of the sovereign, change the destination of places originally intended for public use, but which an alteration of circumstances has rendered improper for that use. But the king united both these powers ; therefore, his will was sufficient to change the destination. This reasoning appears to me to be built on an [701] incorrect view of the nature of the French laws, relating to the communities or municipalities of towns or communes. No act of incorporation was necessary to create them. The permission of the king, as we have seen, by the quotation from Domat, was sufficient. Once created, they had their rights independent of the crown ; rights of property and franchises, which

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he could no more legally invade, than he could the property of an individual. In France, most of the towns held their franchises and property by long usage, which, in general, supposed a royal permission. In their colonies, all the towns were created by the same means which were pursued in the present case ; the survey under royal authority, or that which it had delegated, and the subsequent government by municipal officers, appointed by the crown or permitted to be chosen by the people. The argument seems to admit, in one part, that after an incorporation, this union of royal and corporate powers ceased. If, then, the survey and plan by royal authority were equivalent, under the French, to an incorporation under the common law, the argument totally fails. How far it applied to the Spanish law (more immediately the subject of controversy in that suit), may be judged of by the 1st law, title 16th, of the 7th book of the Novissima Recopilacion ; which enacts, that all royal grants made, or to be made, of the rights or property of any cities, towns or places, shall be declared void.

The same want of attention to the distinction between lands to be granted to a city, as its *proprios*, that is to say, lands not for common use, but for supporting the charges of the city, and those designated as a component part of the city in its first formation, prevades the argument (p 73) ; where the viceroys who had the power to assign such *proprios* to new cities, were directed to send to the king an account of what they have thus designated, that he may confirm them, is brought, to prove that designation alone is not sufficient ; there must be an after grant. But this law speaks of one thing ; our case, and the case before the court in Louisiana, of another. A mere designation of part of the royal domain out of the city, for the purpose of supporting the city charges, may require a regular grant ; while a mere designation of a part of the city for the common use of the inhabitants, may be, and is, sufficient, without a grant. The distinction between the three kinds of common property that may be held by a municipality, is clearly drawn in the *Spanish law (3 Partidas, Laws 7, 8, 9, tit. 28) ; [*702 one, that is common to all the world, such as the port, the shores, &c. ; another, for the common use of the citizens ; a third, for the expenses of the community, but which last are not subject to the use of the citizens individually, as the others are. These last are called *proprios*, and by confounding the laws relating to these three, we run into inextricable error. The whole of this opinion of the truly learned judge of the supreme court of Louisiana is, however, based on the idea, that the dedication to a public use in the plan, cannot operate as a grant, according to the laws of France or Spain ; although he admits, that they would, according to the laws which govern the other states. For, in the conclusion, he admits, that if they had been granted to the city, they would not have passed by the treaty to the United States.

Before I finish my examination of this able opinion, which the attorney-general has converted into a part of his argument, I cannot but make one general remark on the power which it assumes to be vested in the kings of France and Spain, to re-assume and dispose of those parts of a city which they had designated for public use in the plans they had made of it ; a power insisted on, with respect to a quay, to all the land lying between the city and the river, shutting it up completely from the only means of carrying on its commerce, and which yet it is acknowledged, they did not possess

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with respect to the streets. But supposing, contrary to the fact, this town to have been laid out on land belonging to the king, he gave the streets in no other way than he gave the space in question; if the one binds him, so does the other. The law by which the city holds is not the mere common law, it is the law of eternal justice, pervading every system, common to every country, and from which every departure is an injustice, and an anomaly. What is given cannot be resumed, without wrong, any more than that can be taken which is derived from any other source. King, republic or individual, who gives a right over a property, can no more resume it, than he can seize on that which he never possessed. The designation in the plan meant the same thing in Louisiana, under the French law, that it did in America, under the common law; in both, it was meant to give a right; in both, that right is sacred.

I have now examined the title set up by the appellees. I have shown that it cannot be supported by the words or the spirit of the treaty under [703] which they claim. That the state decisions which are supposed to strengthen it, are more numerous in favor of the defendant. I hope I do not flatter myself, in thinking that the only one in favor of the appellees ought not to be considered as authority; because in some points the cause is different; in others, the reasoning on which it is founded is unsound; and because the court giving the decree was divided.

Although in showing the weakness of the plaintiff's title, I have necessarily anticipated many topics which enter into the establishment of ours; yet I must pray the indulgence of the court, while I spread it before them in a connected point of view. The topographical position of the lands in dispute has been so frequently described, and is so accurately laid down on the plans which are before the court, that no further description is necessary. The following historical facts are material parts of the case; and are proved by works admitted as authority by the parties. That the colony of Louisiana having been previously granted to Crozat, he, in the year 1717, surrendered it to the crown; and that a new grant was, in the same year, made to the West India Company, conceding to them all the lands, in allodial tenure; with extensive powers of making establishments of commerce. That the position of the chief town was designated to be at a place where New Orleans now is, about the year 1720; but that the seat of government was not removed from where it had been first established, until 1724; when a plan was made, of which we have a copy, signed by De Panger, who is proved to have been royal engineer, bearing date the 29th May 1724; and designating, by different colors, the buildings made before September in the preceding year, and those made since. That altogether some hundreds of houses then appear to have been already built on the streets as delineated on the plan. That on the 15th of May 1728, another plan was made by Broutin, also a royal engineer, conformable, in the designation of the streets and public plans, to that of De Panger; with the addition of a great number of public and private buildings marked on it, all situated on the streets as designated in both plans. That in 1744, another plan was engraved and published in Charlevoix's History of Louisiana, conformable in all respects, except in the addition of other improvements, but without any alteration of the streets, wharves and public places, to the plans before [704] mentioned. That this work has been admitted as authentic by the

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ties. That in all these plans, the word *quay* is written opposite to the front row of houses, and on the space between them and the river ; which space constitutes the premises in question. That on the first and third of these plans, the ditch and fortifications inclosing the town plot are delineated ; and that they are carried round three sides ; and terminate at the river, on each side, inclosing, with the river, the premises in question.

Upon these facts and documents, together with the admissions on record, that towns in the French colonies were not created by act of incorporation, but by plans made by the royal engineers, and deposited in the bureau of the marine, from whence they have been drawn ; in addition to the corroborating facts of possession, and other circumstances hereafter alluded to ; the appellants rest their claim of title to the premises in question as a part of the town.

The cases of Cincinnati and Pittsburgh contain all the law necessary to be cited, in order to establish a title under this evidence ; unless—1. A body of law should be found to govern this case, different from that under which those decisions were given. 2. Some evidence should be found in the case, to counteract the force of that relied on by the appellants.

I. The cases are perfectly parallel, except that the fact of dedication, which was proved by inference and circumstantial evidence in one of the cases decided by this court, and by parol testimony in the other, is here shown by written evidence on the face of the plan itself. That here, the ditch, in the first plan, and afterwards, the fortifications, which formed the boundaries of the town, are designated on the plan, showing the premises to be as much an integral part of the town as the streets or squares ; it is, therefore, not a parcel of land claimed to have been given to the city, but one of the public places of the city itself, within its designated boundaries, that is claimed in this suit by the United States, as their property, to be disposed of as they may think fit. In this case, as in those decided by this court, the lands in dispute are such as are absolutely necessary to the wants of a commercial city, more particularly as applicable to those of a great commercial sea-port. The cases then only differing in points which make this stronger than those decided, they must be considered as authorities *in point, [*705 unless it can be shown, that they are not governed by the same law ; but this inquiry has already been made in discussing the opinion of the court in the case of *De Armas*. And I cannot but think, that it has been sufficiently shown, that the principles which must govern the cases are essentially the same in both systems of law. I cannot, however, avoid drawing the attention of the court to the very learned and able opinion delivered by the dissenting judge (MARTIN) on this point. (p. 48.) He says : "I have looked in vain, in the opinion of the court, for any reference or allusion to any principle peculiar to the common law of England. It has appeared to me, that the case was determined on the just, broad and general principles of law in the *corpus juris civilis*: *honeste vivere*, to act honestly : *polliciti servare fidem*, when we have made a promise to keep it ; and the necessary corollary, *turpe est fidem fallere*, it is shameful to disappoint expectations we have authorized."

II. If the laws are the same, and there is no difference in the *prima facie* case we have made, the only circumstance which can prevent a similar decree, would be the production of some evidence to counteract that on which

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we rely. This has been attempted. With what success, we shall next inquire.

1. It has been contended, that although this space may have been designated for public use as a quay, yet being given by the king, he might resume his grant; that the United States, succeeded to his rights, may, when they think proper, make the like resumption; and that the king of Spain actually did exercise it, by making grants within the contested limits, with the acquiescence of the city authorities. The first two points have been already examined; and it has been shewn, that no such right of resumption did exist, or could exist, either in France or Spain; that in the latter kingdom, it was forbidden by positive statute; and in the former, and indeed, everywhere, by the first principles of justice.

The exercise by the Spanish authority remains to be examined. The plaintiff produced six grants or permissions to build on the space in question. Of these, the first is that of Magnon, who petitions for a grant of a parcel of land, near the levee, for the purpose of pursuing his business as a ship-carpenter, which he states to be essential to the service of the king. This petition is referred to the law-officer of the crown (the assessor), who gives ^{*706]} it as his opinion, that "although the council of *the city might have some objection on account of the lot being situated within its precincts," yet he advises the grant, from the necessity of having a ship-yard. But no grant was made, although the opinion was delivered in August 1790, and the transfer of the province did not take place until December 1803. This fact, then, corroborates instead of impairing our title. The law-officer declares that the city had good objections, that the land lay within the limits; and notwithstanding the alleged necessity, no grant was made. The next is a similar application from Chessé, a calker, for permission to build a shed. But this is addressed, not to the government, but the city authorities, and permission is given to build and hold the shed at their will. Another evidence not of royal but of municipal authority. The third grant is to Bertrand, but it is merely a permission to build a shed, immediately after a distressing conflagration; which was so far from conveying any property, that the petitioner could not repair the shed, without asking a new permission. Urtubuise asserts to the commissioners of the United States (as they report), that he had permission to build, from the governor, but produces no authority. Thus far, then, nothing is proved to impair, but something to strengthen, the case of the appellants. Their claim acknowledged by the law-officer of the crown, in one instance; the actual exercise of dominion over it, in another. In the third, nothing but a permission dictated by charity, in a time of great calamity, when strict scrutiny of the powers of different officers would not be made; and in the fourth, nothing but the allegation of a party produced.

The two remaining grants, to Mentzinger and Liotaud, are, it must be confessed, acts which directly asserted the right of the king of Spain to dispose of the property in question; but they were the acts of a subordinate officer, and were so far from being acquiesced in by the city, than an appeal and remonstrance were made to the king; on which, according to the usual dilatory proceedings of that monarchy, no decision was made prior to the transfer. This fact is stated in MARTIN's opinion (p. 47). No other grants, however, were made; and the attorney-general might have added to these

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arbitrary acts of disturbance, one of a more striking kind ; where a Spanish governor sacrificed four of the principal inhabitants, and placed the tyrant's mark of blood on the very ground now in question. My learned friend's humaanity would not permit him to avail himself of *this act of pos-
session, but it is quite as good as another that has been relied on, the [*707
parading of the troops on a part of the premises. After this arbitrary sacri-
fice of the lives of its citizens, by the first governor, his successors might
reasonably think themselves authorized to use little ceremony in disposing
of the property of the city ; and if it had been acquiesced in, a better reason
might have been alleged, than an acknowledgment of the king's title.

The corporation, it is said, have, by various acts, acknowledged the right
of the United States. They have petitioned for, and accepted grants of
part of the land ; but this was done, before they had discovered the evidence
of their title. And even if done, with a full knowledge of it, could never
divest them of the property.

No act of interference with the rights of the city having been found,
under the French government, one of our strong pieces of testimony has been
ingeniously made to supply this deficiency. We produced nineteen ancient
grants of lots, in the front row of the city, all of which called for the quay
as their front boundary; these were produced to corroborate the evidence
resulting from the inscription of that word on the plans. Now, one of these,
instead of using the expression bounded by the quay, says situated on the
quay, *sur le quai*: just as we say a farm situated on such a river, a lot in
such a street. But to take away all doubt on the subject, we have the lot
in question located on the map, with the name inscribed, and shown to be
one of the front lots bounded by the quay. These are the only evidences
of interference, by either of the governments ; none by France from the
laying out of the city in 1720 to the transfer, forty-nine years ; and such as
have been described, that of Spain, since.

An argument has been used, which requires some notice. It is said, that
although the inhabitants of the city, individually, might have a right to the
use of this ground ; yet, the corporate body, now representing them, can
have no title ; because, during the French and Spanish dominion, there was
no corporation. The king, if I understand the argument, had the power
of the corporate body, and held the ground for the use of the citizens ; that
the fee was in him, subject to the servitude, for the benefit of the citizens ;
that this right was vested in the United States, by the transfer, and that
they now hold it in the same manner that the king did. The first objection
to this argument, is the radical one, that every community, under the French,
as well as the Spanish government, has its officers to represent them ; and
although, by the statement *of facts, it is considered, that what we [*708
call an act of incorporation was not passed, yet all its effects were
produced by the erection of the town. Under both governments, every town
had its municipal officers, who took charge of its property and asserted its
interests, very frequently, against the encroachments of the king himself ;
an instance has been already mentioned in the remonstrance of the *cabildo*,
against the governor's grants. Again, if there was no corporate body, nothing
to represent the city, but the kingly power ; how, and to whom, did the
king make the grant of the commons, and the lots fronting the public square,
for the *proprios* of the city, as has been proved in this cause. Not to himself,

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surely. No! he made it to the *cabildo*, for the use of the city. The ground designated for streets, squares and quays, by the plan, vested in the municipality of the town, for the common use of the citizens, under the French government, passed to the *cabildo*; under that of Spain, was exercised by a temporary municipality, appointed by the French prefect, who received the transfer from Spain, in order to deliver it to the United States. They held it, until the United States entered into possession, when another provisional municipality was appointed, and remained in office, until their powers, by a regular act of incorporation, were vested in the present defendants. By that act, "all the estates, whether real or personal, the rights, dues, debts, claims or property whatever, which heretofore belonged to the city of New Orleans, or had been held for its use, by the *cabildo*, under the Spanish government; the municipality, after the transfer, in the year 1803, to France; or the municipality now existing, shall be vested in the mayor, aldermen and inhabitants, to be enjoyed by them and their successors for ever." This act passed during the first stage of territorial government, when all laws were submitted to congress for their revision. Consequently, they are estopped from saying that they have any interest in property which at any time was held by the municipality or the *cabildo*; but it has been indisputably shown, that for more than forty-nine years, from the year 1720 to 1769, under the French government, and from that time to the transfer, in 1803, under the Spanish, there has been such possession of the premises. Therefore, if every other title were wanting, this alone would be sufficient to establish our right.

An equally strong objection to this argument, arises from the constitutional power of congress. If the kings of France and Spain *could [709] be trustees for the inhabitants of cities, and exercise, either mediately or immediately, all the municipal powers necessary for the protection of such rights, how is congress to interfere? even if the same rights had been transmitted to them by the terms of the treaty. There is a want of distinction, some confusion of ideas, in this branch of the argument. An acknowledged power and duty of sovereignty is confounded with one with which it is not invested, and which it could not exercise, if it were. The sovereign power has no right to exercise the duties, which, by its grant, it has devolved upon the authorities of a city or town; it does not hold the property which is dedicated to the public use of the citizens of that town; but it always retains the power of obliging their municipal officers to observe the terms of the grant, to preserve the property for the use for which it was given. Thus, immediately after the transfer of the country to the United States, before the local territorial government had been established; if the municipal officers of New Orleans had attempted to change the streets, to dispose of the public square, or in any other illegal way to injure the rights of the citizens, the United States, as the sovereign of the country, by its proper officers, might have taken cognisance of the case and prevented or redressed the injury. Then, they might have sustained a suit in their name, as the sovereign of the country, for an injunction to prevent an illegal sale of common property; but not, even then, one like the present to recover the possession of it. But after a local government had been established, under the territorial grade, with its legislative council, its judicial and executive officers, and all the other attributions of supreme power,

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restricted only by the powers vested in the general government; when, afterwards, in pursuance of the terms of the treaty, Louisiana was admitted into the Union, on equal terms with the other states; in both these cases, that superintendence over the municipality, which bears the attribute of local sovereignty, was transferred to the territorial, first, and afterwards to the state government; and can never be exercised by the United States, unless, indeed, the construction of the constitution should be adopted, which has for the first time, that I am aware of, been contended for in this cause. But even then, if the power given to congress to regulate commerce, should be found to mean the grant of a jurisdiction over wharves and ports, something more would be necessary, before that power could be exercised; a code of the police of ports, the creation of officers hitherto unknown to our government, and some mode of settling the clashing interests of the cities, the states, and the United States, in all the ports of the Union. [*710] For, I repeat, if the power exists on the wharves of New Orleans, it must exist in those of all the states; for the argument derives it from the constitution, which must operate upon all. That so great an extension of the powers of the general government has never before been thought of, is a strong proof against its adoption; and I quit the argument, without any fear that the court, by sanction, will make an inroad on state rights, which the learned counsel for the United States would be the first to deplore.

I may hope, from this view, that I have shown, that the United States can claim no property in the soil. That they cannot recover in this suit, even if they had a title, because they have not shown such a possession as would sustain a suit for a perpetual injunction. That the decision of the state court forms no authority to guide that of this court. That the lands in question were dedicated to public use and vested in the city by evidence that cannot be controverted. And that the rights of the city, under the French and Spanish government, have been regularly transmitted to the defendants, forming a chain of title that has vested the property in them, subject to laws, for the due observance of which they are amenable to the state authorities, not to those of the United States.

But if there should be a failure in any of these points, there is one on which we cannot be mistaken: The title derived from prescription, by a possession of more than a hundred years: Law 1, tit. 7, lib. 5, Recop.; and law 1, tit. 15, lib. 4, Recop. To rebut this, an authority has been introduced from Domat, to show that things destined for public use cannot be acquired by prescription; an authority showing clearly that property of that description cannot be acquired by an intruder on the common property of a city, but, most clearly, not forbidding the acquisition of them by the city under that title: a law made for the protection of public property, not to prevent the application of a law in their favor, which comes in aid of lost titles.

McLEAN, Justice, delivered the opinion of the court.—This case is brought before this court by an appeal from the decree of the district court for the eastern district of Louisiana. *Under a practice which is peculiar to Louisiana, the attorney of the United States, on their behalf, presented a petition to the court, which represented, that the mayor of the city of New Orleans, in pursuance of an ordinance of the city coun-

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oil, had advertised for sale, for a day then past, and was about to advertise anew, for sale, in lots, the vacant land included between Ursuline, Levee and Garrison streets, and the public road in the city of New Orleans; and also, the vacant land included between the Custom-house, Levee and Bienville streets, and the public road in the said city. And the petitioner further stated, that by the treaty of cession of the late province of Louisiana, by the French republic, to the United States of America, the United States succeeded to all the antecedent rights of France and Spain, as they then were, in and over the said province; the dominion and possession thereof, including all lands which were not private property; and that the dominion and possession of the said vacant lands, ever since the discovery and occupation of the said province by France, remain vested in the sovereign; and had not, at any time prior to the date of said treaty, been granted by the sovereign to the city. And the petitioner prayed for an injunction to restrain the city council from selling the land, or doing any other act which shall invade the rightful dominion of the United States over said land, or their possession of it; and a perpetual injunction was prayed.

To this petition, the mayor, aldermen and inhabitants of the city answered, and denied the material facts and allegations in the petition; and they specially denied, that the dominion and possession of the land, at the time Louisiana was ceded to the United States, were vested in either the king of Spain, or the sovereign of France, either as vacant land or under any other denomination. And in a supplemental answer, the respondents say, that the inhabitants of the city of New Orleans are the true and lawful proprietors of the vacant lots they have been enjoined not to sell, 1. Because all the space of ground which exists between the front line of the houses of the city and the river Mississippi, was left by the king of France, under the name of quay, for the use and benefit of the inhabitants of the city. 2. Because if, since the foundation of the city of New Orleans, said space of ground became wider than was necessary for the public use, and the quays of the city, it was in consequence of an increase formed by alluvion in the greatest part of the front of the *city; and the works *712] which were necessarily made from time immemorial by the inhabitants of the city, or at their expense, to the levee in front thereof, to advance it nearer to the river than it was formerly. 3. Because, by the laws of Spain which were in force at the time when said alluvions were formed, and said works were made, alluvions formed by rivers in front of cities belonged to the inhabitants thereof; who may dispose of the same as they think it convenient, on their leaving what is necessary to the public use. And the respondents say, that the vacant lots are of great value; and cannot be disposed of, unless they shall be indemnified by the government, &c.

A general replication was filed by the district-attorney, in behalf of the United States. Statements of facts, signed by the parties, appear in the record.

If this cause be considered on the broad ground on which it is presented by the facts and the arguments of counsel, it is one of great importance. In one view, the title to property of the value of several millions of dollars, depends upon its decision; and in any aspect in which it may be considered, principles of the civil law, and the usages and customs of the governments of France and Spain, and also, it is insisted, important principles of the

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common law, as well as the effect of certain acts of our own government, are involved.

In the able arguments which have been heard at the bar, these topics have been elaborately examined and variously illustrated ; and it now becomes the duty of the court to pronounce their opinion in the case. Being constituted the organ of that opinion, the matters in controversy will be considered under the following arrangement. 1. The rights of the plaintiffs in error, by the principles of the common law. 2. Their rights under the laws and usages of France and Spain. 3. The interest of the United States in the property claimed by the city, and their jurisdiction over it.

That property may be dedicated to public use, is a well-established principle of the common law. It is founded in public convenience, and has been sanctioned by the experience of ages. Indeed, without such a principle, it would be difficult, if not impracticable, for society in a state of advanced civilization, to enjoy those advantages which belong to its condition, and which are essential to its accommodation. The importance of this principle may not always be appreciated, but we are in a great degree dependent on it for our highways, the streets of our cities and towns, and the grounds appropriated as places of amusement or of public business, which are found in all our towns, and especially in our populous cities. It is not essential that this right of use should be vested in a corporate body ; it may exist in the public, and have no other limitation than the wants of the community at large.

This court had occasion to consider this doctrine in two important and leading causes, which lately came before them, and which are reported in 6 Peters. The first one was the *City of Cincinnati v. Lessee of White*. In 1789, the original proprietors of Cincinnati designated, on the plan of the town, the land between Front street and the Ohio river, as a common, for the use and benefit of the town for ever. A few years afterwards, a claim was set up to this common, by a person who had procured a deed from the trustee in whom the fee of the land was vested, and who had entered upon the common, and claimed the right of possession. The proof of dedication being made out to the satisfaction of the court, they sustained the rights claimed by the city. At the time the plan of the city was adopted by the proprietors, and this ground was marked on the plat as a common, they did not, in fact, possess the equitable title to the space dedicated ; but they shortly afterwards purchased the equitable title, and it was held, that under the purchase, the prior dedication was good. In their opinion, the court refer to a great number of decisions of this court and others, in this country, and also of the highest courts in England, to sustain the principles upon which the decision was founded. The doctrine is now so well settled, and so generally understood, that it cannot be necessary to cite authorities in support of it.

In the case of *Barclay v. Howell's Lessee*, the same principle was sanctioned, as applicable to facts somewhat variant from those which constituted the Cincinnati case. In 1784, the representatives of William Penn, in whom the proprietary right of Pennsylvania was vested, by their agent, laid out the town of Pittsburgh. The original plan of the town, the court say, "shows that it was laid out into lots, streets and alleys, from the junction of the Allegheny and Monongahela rivers, extending up the latter to [**714

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Graft street. With the exception of Water street, which lies along the bank of the Monongahela, all the streets and alleys of the town were distinctly marked by the surveyor, and their width laid down. Near the junction of the rivers, the space between the southern line of the lots and the Monongahela river is narrow, but it widens as the lots extend up the river. From the plan of the town, it does not appear, that any artificial boundary, as the southern limit of Water street, was laid down. The name of the street is given, and its northern boundary, but the space to the south is left open to the river. All the streets leading south terminate at Water street, and no indication is given in the plat, or in any part of the return of the surveyor, that it did not extend to the river, as it appears to do by the face of the plat." And the surveyor being dead, his declarations at the time of making the survey, that Water street should extend to the river, were sanctioned as evidence ; and it appearing that the convenience of the town required the extension of this street to the river ; and there being no statement or line marked on the plat of the town as opposed to it ; and as the public, for thirty years or more, in some parts of the town, had thus used the street ; and property had been bought and sold in reference to it, in this form ; it was held to be sufficient evidence of its having been dedicated to the public. The street thus extended afforded a large and convenient space for commercial purposes, along the shore of the river, beyond what was required for a street.

On the 26th of September 1712, about thirty-eight years after Louisiana had been taken possession of by Lasalle, in the name of the king of France, a charter was granted by the king to Crozat, conferring on him exclusive rights, for commercial and other purposes, over a great extent of country, which included the territory that now forms the state of Louisiana. The absolute property in fee-simple was vested in him, of all the lands he should cultivate, with all buildings, &c., he taking from the governor and intendant grants, which were to become void on the land ceasing to be improved. The laws, edicts and ordinances of the realm, and the custom of Paris, were extended to Louisiana.

This charter was afterwards surrendered by Crozat to the king ; and a new one was granted, on the 6th of September 1717, to a corporation styled *715] the Western *Company. The land, coasts, harbors and islands in Louisiana, were granted to this company, as they had been to Crozat, "it doing faith and homage to the king, and furnishing a crown of gold, of the weight of thirty marks, at each mutation of the sovereignty." The power is given to this company to grant land allodially. And under its auspices, the ground where the city of New Orleans now stands, was selected as a place for the principal settlement of the province. A short time afterwards, the foundation of the city was laid, by the construction of a few huts and other improvements. In 1724, and also in 1728, by the facts proved, it seems, maps of the town were made, on which the vacant space, now in controversy, was designated by the name of *quay*. The Western Company continued to act under its charter, until January 1732, when, with the king's leave, the charter was surrendered, and a retrocession was made by the company of the "property, lordships and jurisdiction of Louisiana."

The town of New Orleans was established, and the plan, as designated in the maps referred to, adopted, while the country was under the jurisdic-

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tion of the Western Company ; and the dedication to public use, of the vacant space in contest, was made by it, so far as a dedication is shown by the plan and the indorsement of the word *quay* upon it. In the agreed facts, a quay is admitted to be a vacant space between the first row of buildings and the water's edge, and is used for the reception of goods and merchandise imported or to be exported. In the civil code of Louisiana, a quay is said to be "common property, to the use of which, all the inhabitants of a city, and even strangers, are entitled in common, such as the streets and public walks." The term is well understood in all commercial countries ; and whilst there may be some differences of opinion as to its definition, there can be little or none in regard to the popular and commercial signification of it. It designates a space of ground appropriated to the public use ; such use as the convenience of commerce requires.

This entire vacant space has been used for the purposes to which it ~~was~~ appropriated, with but occasional and slight interruptions to small portions of it, from the establishment of the designation of the quay in 1724, until the present time. The interruptions referred to, were not such as deprived the public of the proper use of the ground. They were generally of a temporary nature, and were permitted, *where private accommodation was in some degree connected with the public convenience. [**716] Temporary shops, and baths, which were constructed upon this ground, were of this character. The public established, at different times, and for different purposes, buildings of a more permanent description ; but these were rendered necessary for the public service, and they seem not to have encroached, to any injurious extent, on the public use of the quay. Some of these buildings have long since disappeared, and any of them which may still remain, do not subject the city or the public to any inconvenience. The city authorities, at an early day, would scarcely be expected to object to the construction of barracks on this space, for the accommodation of the soldiers, which were there stationed for the protection of the city. And much less would they be expected to object to the use of the common, for the occasional performance of military evolutions. The custom-house and public warehouse, erected on this ground by the Spanish government, have disappeared ; and the construction of the present custom-house on the quay, by the federal government, in 1819, cannot be considered as affecting the original dedication. It may be convenient for the city to have the custom-house situated on this ground, and it does not interrupt the public use.

Two or three grants of small lots of ground within this common, were made under the Spanish authorities ; but under the present head of inquiry, it is unnecessary to examine, whether these acts were not the exercise of arbitrary power, by the Spanish officers, and being held in derogation of vested rights, should not be held as nullities. If these titles were given in the exercise of a discretion, still they would not go to abrogate a vested right, only to the extent of the titles. But this question will be more particularly examined hereafter.

Suppose, on the common at Cincinnati, or on the vacant space connected with Water street, at Pittsburgh, it had been proved, that the state had constructed a custom-house, or temporary barracks, would such acts have been considered as disproving a dedication. Clearly, they would not ; nor would grants for one or two lots within either space, unadvisedly issued and in

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derogation of vested rights, have been so considered. The title to Penn and his heirs was allodial, and we have seen, *that the Western Company was authorized to make such titles. Like the heirs of Penn, the Western Company was proprietor of a great extent of territory, and the dedications were made under circumstances somewhat similar ; but the proof of dedication of the common or quay at New Orleans, is incomparably stronger than was found in the Pittsburgh case.

It appears, that this quay has been greatly enlarged, by the alluvial formations of the Mississippi river ; and from this fact, an argument is drawn against the right of use in the city, at least, to the extent asserted. The history of the alluvial formations by the action of the waters of this mighty river, is interesting to the public, and still more so to the riparian proprietors. The question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied, on just principles. Every proprietor whose land is thus bounded, is subject to loss, by the same means which may add to his territory ; and as he is without remedy for his loss, in this way, he cannot be held accountable for his gain.

This rule is no less just, when applied to public, than to private rights. The case under consideration will illustrate the principle. If the dedication of this ground to public use be established by the principles of the common law, is it not of the highest importance, that the accumulations of the vacant space, by alluvial formations, should partake of the same character and be subject to the same use as the soil to which it becomes united ? If this were not the case, by the continual deposits of the Mississippi, the city of New Orleans would, in the course of a few years, be cut off from the river, and its prosperity impaired. If the city can claim the original dedication to the river, it has all the rights and privileges of a riparian proprietor.

But there is another consideration, of great weight on this subject. It appears, that the city, from time immemorial, has been compelled to construct, at great expense, and keep in repair, levees, which resist the waters of the river, and preserve the city from inundation. If it were not for these levees or embankments, it appears from the facts proved, that not only the city of New Orleans, but the country, to a great extent, bordering on the lower Mississippi, would be *uninhabitable. These works resist the current of the river ; eddies are formed, and the deposits rapidly accumulate. In this way, has the vacant space been greatly enlarged within twenty or thirty years past. This enlargement of the quay cannot defeat or impair the rights of the city ; and the question only remains to be answered, whether the facts in this case, by the principles of the common law, show a dedication of this vacant space to public use. No one can doubt, that the answer must be in the affirmative.

The original dedication is proved by the maps in evidence, and by a public use of more than a century. These facts are conclusive. The right of the city is sanctioned by time, and established by uncontroverted facts. No case of dedication to public use has been investigated by this court, where the right has been so clearly established. What effect the acts of

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the federal government, and the acts of the corporation of the city may have upon this right, will be considered in another branch of this case.

As the rights claimed by the city had their origin under the laws of France, and were enjoyed for nearly forty years under the laws of Spain, it becomes necessary to examine those laws, to ascertain the nature and extent of these rights. On this ground, the claims of the city have been earnestly and ably, if not confidently, resisted in the argument. The laws of France and of its colonies, it is admitted, prevailed in Louisiana from its first settlement until the 25th November 1769, when they were abrogated by O'Reilly, captain-general under the king of Spain.

On the part of the defendants in error, it is contended, that the corporation of the city has no title whatever to the soil, or to the use of the premises in question; and great reliance is placed on a decision lately made by the supreme court of Louisiana, in the case of *C. G. De Armas and M. S. Cucullu v. The Mayor, Aldermen, &c. of the city of New Orleans*. Two of the three learned judges who compose that court lay down principles, in their opinions in that case, which are inconsistent with the right asserted by the city in this case; and it is insisted, that this decision, which disaffirmed the right set up by the city, is conclusive on this court. So far as the present controversy may be supposed to arise under the laws of the United States, or the treaty of cession, it is clear, that the decision of the Louisiana court cannot be considered as settling the question. In the argument on behalf of the government, *the principle is laid down, that by the laws of France, a city or town could not acquire a right or [**719 title to the soil of immovables, or to the use of them, without letters-patent from the king. And Domat, with other authorities, is referred to, who, in treating of communities, declare, as a primary rule, that they should be established for the public good, and by order or permission of the prince. By the third section in the statement of facts, it appears, that towns in the French colonies, were never incorporated, like those of the United States; they are founded in the virtue of orders emanating from the government, or from the minister of marine, and transmitted to the governors of the colonies, and their administration was confided to intendants, who had authority to enact the necessary public regulations.

It is insisted, that no reasons are assigned, why the law of France was not complied with, by issuing a grant, if the dedication of this common was in fact made. That the plan of the town may be presumed to have been made, and the ground in contest designated, as appears on the maps, for other purposes than those supposed by the city authorities. That the maps were for a long time lost sight of, and could not have been considered as evidence to supply the place of a grant; had this been the case, they would have been preserved with care. But the most exclusive argument against this dedication is, it is said, that until the town was incorporated by letters-patent, it was incapable of taking by grant. And the decision of the supreme court of Louisiana is referred to, as sustaining this doctrine. Great respect is due to the opinions of the two learned judges who made this decision; and especially, on questions arising under the civil law, with the principles of which they must be familiar. Still, it would seem, that a ready answer may be found to, at least, some of the objections stated by the counsel. In the first place, the dedication of this common was made by the Western Company, who had

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power to make grants ; and ignorance of their rights, by the inhabitants of the city, or of the necessary evidence to establish them, affords no very satisfactory proof against the existence of those rights. And if reasons can be assigned, why this ground was designated on the plat, as a quay, which show that such indorsement could not have been designed as a substitute for a grant ; yet, in the absence of satisfactory reasons, is it not fair to presume in favor of a servitude which has been enjoyed by the city for more than a century ? *Whether the retrocession of Louisiana, its jurisdiction, &c., by the Western Company to the king of France, could affect the rights previously granted by it, may be hereafter considered.

*720] It is admitted, that the power of the sovereign over the streets of a city, is limited. He cannot alien them, nor deprive the inhabitants of their use, because such use is essential to the enjoyment of urban property. And a distinction is drawn, in this respect, between the streets of a city and other grounds dedicated to public use. The latter, it is contended, is not only under the supervision of the king, as to its use, but he may sell and convey it. Now, it would seem, in reason, that the principle is the same in both cases. The inhabitants of a town cannot be deprived of their streets, as the streets are essential to the enjoyment of their property. In other words, by closing the streets, the value of the buildings of the town would be greatly reduced, if not entirely destroyed. And if ground dedicated to public use, which adds to the beauty, the health, the convenience and the value of town property, be arbitrarily appropriated by the sovereign to other purposes, is not the value of the property, which has been bought and sold in reference to it, greatly impaired ? The value may not be reduced to the same ruinous extent, as it would be to close the streets, but the difference is only in the degree of the injury, and not in the principle involved.

Domat, liv. 1, tit. 8, § 1, art. 1, says, there are two kinds of things destined to the common use of men, and of which every one has the enjoyment. The first are those which are so by nature ; as rivers, the sea and its shores. The second, which derive their character from the destination given them by man ; such as streets, highways, churches, market-houses, court-houses and other public places ; and it belongs to those in whom the power of making laws and regulations in such matters is vested, to select and mark out the places which are to serve the public for these different purposes."

But, it is said, if the dedication was made by the king, the citizens of New Orleans, or the public, did not acquire a right paramount to his. And that having a right to regulate the use, and the fee never having been conveyed by him to the city, by grant or otherwise, he must, of course, retain the power of disposing of the property. The right of the king to this property, is compared to the right of a city, which is invested with the fee and the use ; and as in such case, the corporation may dispose of the property dedicated, with the *sanction of the sovereign power, the sovereign, it is contended, having the right of property and the power to regulate the use, may alien. And it is said, that this supervision of the use by the king, was a doctrine peculiarly applicable to Louisiana and the city of New Orleans, where the changes are so frequent, by the continual formations on the shores of the Mississippi, in addition to increase of population and business, which often require alterations in the streets and other public places.

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Though certain places may be dedicated to public purposes by the supreme power, and may be said to be withdrawn from commerce, still it is insisted, where no grant has been made, and private rights have not become vested in the property, it is not withdrawn from the sovereign power. This argument goes upon the fact, that the title to the quay remained in the king of France, which is a controverted point.

That the king, under the law of nations, was entitled to the right of soil of Louisiana, is not contested. The same rights belonged to the sovereign of France, in this respect, as have been accorded to other European sovereigns who made discoveries on this continent; but the conclusion which is drawn from this, that, as no grant was given, the king had a right to alien the ground in contest, the same as any other part of Louisiana, is not admitted. This argument in behalf of the power of the king of France over the common, is founded upon the supposition, that the cession of the country to the king, by the Western Company, destroyed the rights which had become vested under it; and also, that as no grant for the land in contest has been proved, none can be presumed. The doctrine of presumption is as fully recognised in the civil as it is in the common law. It is a principle which no enlightened tribunal, in the search of truth, and in applying facts to human affairs, can disregard.

The retrocession of Louisiana to France, by the Western Company, did not abrogate the rights which had been acquired under it. All the grants to individuals, made by the company, were respected; and there is no act by the French government, from the foundation of the city, to the transfer of the country in 1769, to Spain, which shows that this dedication was not as much respected and sanctioned by the king, as were the grants to private citizens. Does not this long acquiescence of the monarch, and enjoyment of the property by the city, afford some evidence of right? But in addition to this consideration, it appears in evidence, that from the time the plan of the city was adopted, until the country was ceded [*722 to Spain, numerous transfers of property were made, in which the property is described as being bounded by this quay; and also, many official transactions of public officers, in which the quay is recognised and referred to. This shows in what light this vacant space was considered by the public, for nearly fifty years after the dedication was made; and it is not probable, that this subject could have been wholly overlooked by the king. The plan of the city, containing the designation of this quay, was published by Charlevoix, in his *Histoire de la Nouvelle France*, and perhaps by Voltaire. It is true, that New Orleans contained at this time a very limited population; but it is matter of history, that not many years after the foundation of the city was laid, the most splendid scheme of commercial enterprise, connected with banking operations, was projected in France, in reference to Louisiana. So excited did the public mind become on this subject, and so generally was the public attention directed to it, that there is little probability, the dedication of this common could have escaped the notice of the king of France. It was not, probably, deemed too large for the accommodation of a city which was to become the emporium of a country of such vast resources. The public use of this common, for so great a number of years, and the general recognition of it, from the time it was dedicated, in numerous private and official transactions, and the acquiescence of the French

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king, offered no unsatisfactory evidence of right. If a grant from the king were necessary to confirm the claim of the city, might it not be presumed, under such circumstances?

But suppose, the dedication had not been made by the Western Company, and the title were admitted to be in the king, as decided by the supreme court of Louisiana; is it clear, that he had the power to alien the ground at pleasure? It cannot be insisted, that the dedication of this property to public use, whether the title to the thing dedicated became vested in the city, or its use only, could withdraw it from the political jurisdiction of the sovereign power. This would place property of this description on a higher and more sacred principle than private property. But in no point of view, can this be the case. That a jurisdiction, to a limited extent, was exercised by the king of France, over the quays of Paris and the public grounds of other cities in the kingdom, such as permitting buildings to be constructed *thereon, and regulating the manner and extent of such occupancy, is admitted; but this power seems to have been in the nature of a police regulation, and was so exercised as was not incompatible with the public use of the grounds. This authority, however, does not prove that the fee, or the right of use, was not in the public, or that the king had power to convey the lands.

*723] Domat says, "rivers, their banks, highways, are public places, which are for the use of all, according to the laws of the country. They belong to no individual, and are out of commerce; the king only regulates the use of them." And again, in vol. 2, lib. 1, title 8, §§ 2, 3 and 16: "we class public places, as out of commerce; those which are for the use of the inhabitants of a city, or other place, and in which no individual can have any right of property, as the walls, ditches or gates of a city, and public squares." In Domat, lib. 1, tit. 8, § 2, art. 19, it is said, "if it should happen, that some buildings on a public square should be constructed, they might either be demolished, if they should prove any way hurtful or inconvenient, or be suffered to stand, upon condition of their paying a rent, or making some other amends to the public, if found to be more advantageous to let them remain, either because they would be an ornament to a market-place or other public place, or because of the rent they would yield, or other advantages that might be made of them." Judge MARTIN, who dissented from the opinion of the superior court in the case above cited, says, "of public places, the public may claim the use, by exhibiting evidence of a dedication to its profit, by the sovereign or *pater familias*, without any letters-patent, grant or deed." And "of places which are alleged to be the exclusive property of the town or city, or of which the exclusive right to use is claimed, letters patent, a grant or deed must be produced."

The power of appropriating private property to public purposes is an incident of sovereignty. And it may be, that by the exercise of this power, under extraordinary emergencies, property which had been dedicated to public use, but the enjoyment of which was principally limited to a local community, might be taken for higher and national purposes, and disposed of on the same principles which subject private property to be taken. In a government of limited and specified powers like ours, such a power can be exercised only in the mode provided by law; but in an

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*arbitrary government, the will of the sovereign supersedes all rule on the subject.

But it must be admitted, that while the French laws and usages may show the nature and extent of the right of the public to this common, as it was originated and regulated by them, for nearly half a century; yet it is to the Spanish laws and usages we must chiefly look, in determining this head of the controversy. From the abrogation of the French laws, in Louisiana, by O'Reilly, in 1769, until the country came into the possession of the United States, the laws of Spain acted upon and governed the rights in controversy. The retrocession of the country from Spain to France, and the cession of France to the United States followed so soon afterwards, that these transfers, it is admitted, caused no interruption to the laws of Spain. Louisiana was ceded by France to Spain, without any abridgment of the vested rights to property enjoyed by private individuals or communities. The rights of the city of New Orleans were in no respect affected by this cession, unless they have been affected by the action of the Spanish laws; and we will now examine this point.

The fundamental laws of the Spanish nation, and which are understood to be alike binding on the king and the people, are found in the Partidas and the Recopilacion. The 9th law, tit. 20, of Partida 3, contains the following: "The things which belong separately or (severally) to the commons of cities or towns, are fountains of water, the places where the fairs or markets are held, or where the city council meet, the alluvions or sand deposits on the banks of rivers, and all the other uncultivated lands immediately contiguous to the said cities, and the race-grounds, and the forests and pastures, and all such other places which are established for the common use." The 23d law, tit. 32, of Partida 3, is as follows: "no one ought to erect a house or other building or works in the squares, nor on the commons (*exidos*), nor in the roads which belong to the commons of cities, towns or other places; for as these things are left for the advantage or convenience and the common use of all, no one ought to take possession of them, or do, or erect any works there, for his own particular benefit; and if any one contravenes this law, that which he does there must be pulled down and destroyed; and if the corporation of the place where the works are constructed choose to retain them for their own use, and not pull them down, they may *do so; and they make use of the revenue they derive therefrom, in the same manner as any other revenues they possess; and we moreover say, that no man who has erected works in any of the above-mentioned places can or shall acquire a right thereto by prescription."

In the Recopilacion, law 1, b. 4, tit. 15, is the following: "Whereas, in our kingdoms, persons hold and possess some cities, towns, villages, and civil and criminal jurisdiction, without any title from us, or from the kings, our predecessors; and it has been doubted, whether the same could be acquired against us and our crown, by any time: we do ordain and command, that immemorial possession, proved in the manner, and under the conditions required by the law of Toro, which is law the 1st, tit. 7, b. 5, of this Recopilacion, be sufficient to acquire, against us, and our successors, any cities, towns, villages, use, or jurisdiction, civil or criminal, and thing or part thereof annexed, or belonging thereto. Provided, that the time of said prescription be not interrupted by us, or by our command, naturally or

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civilly. But the supreme, civil or criminal jurisdiction which kings have, by their sovereignty and kingly power, which consists in exercising and having justice done, when other lords and judges do not; we do ordain, that this cannot be acquired or prescribed by the said time or any other; and likewise, that the laws say cannot be acquired by time, must be understood of the imposts and tributes coming to or owing to us." And again, Recopilacion, law 1, tit. 7, b. 5, is the following law: "We do ordain, that the *mayorazgo* (*mayorat* of the French, entail, in English), may be proved by the instrument of its institution, together with the written permission of the king who authorized it, provided the said instruments are authenticated; or by witnesses, who testify, in the form required by law, to the tenor of the same, and likewise by immemorial custom proved, establishing that the former possessors have held and possessed the property or *mayorazgo*; that is to say, that the eldest legitimate sons and their descendants used to inherit said property as such, when the holder thereof left other son or sons, without leaving them anything equivalent to what those who succeeded to the *mayorazgo* received; provided, the witnesses be of good reputation, and declare that they have seen it thus for forty years, and heard their seniors say, that they always saw it, and never heard the contrary said, and *726] that it is a matter of public voice, *notoriety and opinion, amongst the inhabitants or residents of the place."

In the Novissima Recopilacion, b. 7, tit. 16, law 1, is the following: "Our pleasure and will is, to preserve their rights, rents and property to our cities, towns and places, and not to make any gift of anything of them; wherefore, we command that the gift or gifts which we may make, or any part of them, to any person whatsoever, are not valid."

A faithful observance of these laws would have preserved the rights of the city, as to the common, free for invasion. No law was cited in the argument, which showed the power of the king of Spain to alienate land which had been dedicated to the public use; and it is clear, that the exercise of such a power would have violated the public law, which is understood to have limited the exercise of the sovereign power in this respect. The king of Spain, like the king of France, had the power to give permission to construct buildings on grounds dedicated to public use, without injury to the public rights; but this does not show that either sovereign had the power to alien such lands. In the 3d Partida, law 3, tit. 32, the sovereign was authorized to grant permission to build on public places. And the comment of Rodriguez, 15 and 16, is, that the building must be so constructed that no one should be injured on his right thereby; because the privileges granted by princes are understood to be granted without prejudice to third persons.

On the 22d February 1770, O'Reilly, governor &c., of Louisiana, published an ordinance, in conformity to law, "to designate city properties and rents belonging to the city of New Orleans;" and among other regulations, "six dollars were required to be paid by each boat, of the tonnage of two hundred tons, &c., for right of anchorage, established and destined to the keeping in repair of the levee or dike, which does contain the river within its limits, in the whole front of the city, &c." This regulation was to continue during the pleasure of his majesty.

As power was given to the king of Spain, by law, to grant permission

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to build on public places, it would seem to follow, that such places were not only withdrawn from commerce, but that the king could not alien them. For if he had the power to do this, in as unlimited a manner as over the crown lands, it would include the exercise of every minor authority over them. If he could sell and *convey the lands dedicated to public use, surely, he might, without any authority of law, grant permission to build on such land. But as it appears from the evidence in this case, that permission was not only given to construct buildings on this common, but, that a part of it was granted in fee, it is contended, that this is evidence of the king's power, not only to regulate the use of this common, but to convey it in fee. And the leading case of *Arredondo*, 6 Pet. 691, is referred to, as sanctioning the principle, that a grant, issued by a Spanish functionary, is not only evidence of title, but also that the officer had the power to issue it. In that case, this court did hold, and the same principle has been sanctioned in numerous cases since, that a grant should be considered as *prima facie* evidence, that it was rightfully issued; but that it might be impeached by any one who set up an adverse claim.

We will examine the grants made, under Spanish authority, to any part of this common, and other acts of jurisdiction over it exercised by the government of Spain, which have been proved by the evidence. On the 14th of June 1792, Carondelet, governor, intendant, &c., granted to Liotaud, a lot of ground, situated within the common; and in the grant, he says, "making use of the power which the king has vested in us, we grant, in his royal name," &c. And on the 10th August 1795, another grant was made of a lot in the common, to Mentzinger, by the same governor. In 1793, Arnaud Magnon, a master-carpenter, represented, by petition to the governor and intendant-general, that he had built a barge for the public, and as a compensation therefor, he asked eighteen or nineteen feet on one side of his house to enlarge it, the same being very small, and that the same was granted to him, but that he had no instrument of writing as evidence of the same, and which he solicits. And he also represented to the intendant-general, that his dwelling-house having been included in the conflagration of 1788, that Governor Miro permitted him to construct a small house near the river, "on the inner side of its dike," and in consequence of this misfortune, and his having built a barge, &c., a small portion of land, of eighteen to nineteen feet, adjoining his house, had been granted to him. That he was afterwards allowed to build a shed, for the convenience of ship-building, &c., and he prays that a title may be granted to him for the lot. *This petition was submitted to the attorney-general, who reported that it appeared to him, "it would be an act of injustice to refuse the petitioner the corresponding titles of property that he solicits;" for, "although the council of this city might have some objection, on account of the said lot being situated within its precincts, this opposition may be easily overcome, by the certainty that if Magnon did not occupy the said lot, it would be necessary that another should occupy it, owing to the necessity and usefulness of said ship-yard to the public." It does not appear, that this claim was ever carried into grant by the Spanish authorities. In 1783, on the petition of Etienne Planche, who represented himself to be a carpenter and calker, and having much work which he could not do in his yard, &c., he asked permission to build a shed in front of his house, which was not to be

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closed, &c. This leave was given, and he, and those claiming under him, occupied the ground for many years, but no grant was ever obtained from the Spanish governor for the lot. Catharine Gonzales, widow of Bertrand, set up a claim; and it appears that on the petition of her former husband, he was permitted to rebuild his house on the common, which had fallen into decay, which was allowed by the governor, &c. But no grant was ever issued by the Spanish authority for this lot.

These permissions to build were given by the governor and intendant, under the law which has been cited, that authorized the sovereign to grant permission to construct buildings on the public grounds. This was not considered inconsistent with the public use, as the power was not to be exercised to the prejudice of third parties. The three lots for which grants were issued, it must be admitted, under the circumstances, is such a final disposition of the property as is wholly incompatible with the public right. For the fee of these lots was not only granted, but also the use. This transfer of the fee, it is contended, affords conclusive evidence that the title to the common remained in the king, and having, in addition to this, the power to regulate its use, he could alien it at pleasure. If this power was possessed by the king, why was the authority given, in the law which has been stated, to grant permission to construct buildings on public grounds?

[*729] This power, as appears from *the record, was exercised over the common in controversy, and only in three instances were lots granted absolutely.

In the case of the *Mayor, &c. of New Orleans v. Bermudez*, decided by the supreme court of Louisiana, 3 Mart. 309, the court say, "however contradictory these expressions may appear to be, the worst conclusion which can be drawn therefrom against the city of New Orleans is, that they had not that kind of possession which is the consequence of an absolute right of ownership. Yet the sovereign having never thought fit to exercise any further right over these commons, and the claim of the city to them having been recognised and confirmed by the successor of that sovereign, the inhabitants of New Orleans must be considered as having never ceased to be the rightful possessors of that land," &c. And in the same book, p. 303, the court say, "in the year 1795, the Baron Carondelet, then governor of Louisiana for the king of Spain, granted to Henry Mentzinger, the appellee, a lot of ground, situated in the city of New Orleans, close to the levee, &c. But the appellants contend, that the spot on which it is located is part of the public highway, and therefore, could not have been lawfully granted for private use, even by the king himself. That public places, such as roads and streets, cannot be appropriated to private uses, is one of those principles of public law, which required not the support of much argument. Nor is there any doubt, that if, by a stretch of arbitrary power, the preceding government had given away such places to individuals, such grants might be declared void. But is this grant located in a street, or on the public road? On this important question of fact, the evidence, produced by the appellant, is by no means satisfactory. They show, that according to general usage in this country, the public road in front of the river is close to the levee. But could there be no derogation from that usage? Was that usage observed within the city of New Orleans? Does not the convenience of placing markets and other public places as near the water as

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possible, as it is recommended by the law of the Indies, make it necessary to deviate from such usages, in cities? General usage, however, is the only ground on which the appellants rest their pretensions. No plan of the city has been exhibited, to show that the lot of the appellee is located upon a place which had been reserved for public use; no testimony has been adduced to prove, that this spot is part of the ground laid out for the *public road. We are called upon to declare this grant void, merely because the general usage of the country is to place the road next the [*730 levee." From this opinion, it would seem, that if there had been satisfactory proof before the court, that the ground in controversy had been appropriated to public use, the decision, instead of being favorable to the grantee would have been against him.

There can be no difference in principle, between ground dedicated as a quay to public use, and the streets and alleys of a town: and as to the streets, it may be asked, whether the king could rightfully have granted them. This will not be pretended by any one. And it is believed, that the public right to a common, is equally beyond the power of the sovereign to grant, unless he dispose of it, under the power to appropriate property to the national use; and then compensation must be paid.

The grant to Liotaud was also contested by the city authorities; but it was decided against them, on a ground which did not embrace the merits of the claim, on the part of the city, as now presented. In speaking of this case, Mr. Justice MARTIN, in his able and learned opinion in the case of *De Armas and Cucullu v. The Mayor of New Orleans, &c.*, says, "in Liotaud's Case, the then plaintiffs labored under the inability to establish the appropriation to the public use, by the founder of the city of New Orleans, of the space which separates the first row of houses from the Mississippi. The appellants stated their ability to establish that, immediately after the grant, murmurs had been excited; and the inalienability of any part of the space having been tenaciously insisted on, the governor had revoked his grant, and indemnified the grantee, by the concession of the lot on one of the streets; but the court decided the testimony was inadmissible, and the witnesses were not heard." "Magnon," the same judge remarks, "was a ship-builder, and the ship-yard was between the levee and the water. The governor, deeming the builder's residence near it necessary to the public service, allotted him a space of ground to live on, near the yard, but on the opposite side of the levee. The question arising out of this grant was not litigated; the city agreeing to compensate Magnon for the relinquishment of his claim." This lot, however, though a part of the ground alleged to have been dedicated to public use, is not within the common or quay contested in this case. And it appears from the above opinion, that to prevent any other titles being made for any part of the common, certain proceedings *were instituted by the attorney-general, at the instance of the city authorities, which prevented the emanation of [*731 any other grants, for any part of the quay, until the country was ceded to the United States.

From a careful examination of the jurisdiction exercised over this common, by the governments of France and Spain, and the laws which regulated this description of property in both countries, the conclusion seems not to be authorized, that it was considered as a part of the public domain or

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crown lands, which the king could sell and convey. This power was not exercised by the king of France, and the exercise of the power of the Spanish governor, in the instances stated, was in violation of the laws of Spain, and equally against its usages. The land, having been dedicated to public use, was withdrawn from commerce; and so long as it continued to be thus used, could not become the property of any individual. So careful was the king of Spain to guard against the alienation of property which had been dedicated to public use, that in a law cited, all such conveyances are declared to be void.

It would be a dangerous doctrine, to consider the issuing of a grant, as conclusive evidence of right in the power which issued it. On its face, it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee. A grant has been frequently issued by the United States for land which had been previously granted; and the second grant has been held to be inoperative. And in a case recently decided by this court, where the government had granted land in the state of Ohio, as land belonging to the United States, which was found to be within the Virginia reservation in that state, to satisfy certain military claims, it was held, that the title did not pass under the grant. If then, the common in question had been dedicated to public use, so as to withdraw it from commerce, and so vest the title in the public, as to preserve it from alienation by the king, the grants issued for the lots stated, cannot affect the right of the public, at least, beyond the limits of those grants.

That both the kings of France and Spain could exercise a certain jurisdiction over this common, and other places similarly situated, has been stated; but this was a police regulation, and was rightfully exercised in such a manner as not to encroach upon the public use. This seems to be the result to which a careful examination of the laws and usages of both countries must lead us.

*We come now to examine, under the third head, the interest of
*732] the United States in the property claimed by the city, and their jurisdiction over it. The first article of the treaty of cession is as follows: "Whereas, by the article the third of the treaty, concluded at St. Ildefonso, the 1st October 1800, between the first consul of the French Republic and his Catholic Majesty, it was agreed as follows: his Catholic Majesty promises and engages, on his part, to retrocede to the French republic, six months after the full and entire execution of the conditions and stipulations herein relative to his royal highness the Duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it, and such as it should be after the treaties subsequently entered into between Spain and other states." And in behalf of the French republic, the first consul ceded, "for ever and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French republic," &c. And in the second article, it is declared, that in the cession "are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands and all public buildings," &c.

Under this treaty, Louisiana was ceded to the United States in full sovereignty, and in every respect, with all its rights and appurtenances, as

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it was held by the republic of France, and as it was received by that republic from Spain. And it is insisted, that the same rights of jurisdiction and property, which appertained to the sovereign of Spain, under its laws and regulations, were, by the treaty, transferred to the United States ; and whether this right extends to the fee of the property in contest, or the regulation of its use, it is contended, that this court must take jurisdiction of the case, and restrain the city authorities from selling any part of it. To show that the federal government has considered this common as a part of the public domain, under the treaty, various laws of congress have been referred to, and official proceedings by the agents of the government, in reference to it ; and also it is shown, that the action of the government has been solicited by the city authorities, who, by these acts, it is insisted, have acknowledged the right of property to be in the United States, as asserted in their behalf by the district-attorney of Louisiana. We will refer more particularly to those acts.

*On the 26th March 1804, congress passed an act, "erecting ^[*733] Louisiana into two territories, and providing for the government thereof;" in the 14th section of which, it was provided, that all grants for and within the territories ceded by France, the title of which was, at the date of the treaty of St. Ildefonso, in the crown, &c., of Spain, were declared to be null and void ;" provided, nothing in the section was to make void any *bond fide* grant, agreeable to the laws, usages, &c., of the Spanish government. An act entitled "an act for ascertaining and adjusting the titles and claims to land, within the territory of Orleans, and the district of Louisiana," was passed on the 2d March 1805. This act, after specifying what titles under the Spanish government should be held valid, and requiring the evidence of title to be exhibited, &c., authorized the appointment of a register, who, with two commissioners to be appointed, were to constitute a board for the decision of land-claims in the territory, &c.; and their report was required to be laid before congress, &c. And by an act of the 3d March 1807, it was provided, "that the claim of the city of New Orleans to the commons, adjacent to said city, and within six hundred yards of the fortifications of the same, be and the same is hereby recognised and confirmed : provided, that the corporation shall, within six months after passing this act, relinquish and release any claim they may have to such commons, beyond the distance of six hundred yards aforesaid," &c. Other acts were passed in relation to land-claims in the district, which it cannot be necessary to notice.

Arnaud Magnon, whose claim has been before referred to, applied to the commissioners, under the above act, to report on land titles, &c., who reported : "We know of no law or usage of the Spanish government, respecting claims similarly situated ; but think it highly probable, that had the claimant applied, he would have obtained a grant for it, as a grant was made to a lot of ground adjoining him, under no higher pretensions. Nor does this appear to come within any of the provisions of the laws of the United States, although there have been ten consecutive years' possession ; the land has not been inhabited or cultivated. This part of the claim we do not feel ourselves authorized to decide on ; but are of opinion, that, in justice, the claim ought to be confirmed." And on the claim of John J. Chessé, the commissioners report, that "they did not feel authorized to

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make any decision on the claim ; *but they thought it would be more an act of justice, than generosity, if the government should confirm it." A similar report was made on the claim of Catherine Gonzales and Peter Urtubuise. Their claims were for lots of ground within the common : and they have been confirmed by acts of congress ; and patents have been issued to the claimants. The claim of the city to the commons was presented by P. Derbigny and L. S. Kerr, who were duly authorized to present it in behalf of the city. And the commissioners reported, "that the claim was in part settled by the acts of congress of 1807 and 1811 ; which confirm to the corporation six hundred yards from the fortifications of the city ; but which are, nevertheless, embraced by the claim aforesaid. That they had in vain searched in the documents to which they were referred for proof of even a shadow of title to this land. That there was no evidence of it ever having been granted or considered as belonging to the city, either by the French or Spanish government. The board, therefore, rejected the claim."

On the 3d of April 1812, congress "passed an act granting to the corporation of the city of New Orleans the use and possession of a lot in the said city." By this act, the city "was authorized to use, possess and occupy the same, for the purpose of erecting, or causing to be erected and kept in operation, a steam-engine or engines for conveying water into the said city ; and all buildings necessary to the said purpose : provided, that if the space of ground shall not be occupied for the said purpose, within the term of three years from and after the passing of this act, or shall, at any time thereafter, cease to be so occupied, for the term of three years, the right and claim of the United States thereto shall remain unimpaired." And by an act of the 30th of March 1822, "the corporation of the city of New Orleans was authorized to appropriate so much of the lot of ground on which fort St. Charles formerly stood, as may be necessary for continuing Esplanade street to the Mississippi river ; and also, to sell and convey that portion of the said ground which lies below said street," &c.

By the act of the 20th of April 1818, congress authorized the president to abandon the use of the navy arsenal, military hospital, and barracks in the city of New Orleans ; and after laying off the ground into lots, to sell them at public sale, &c. And he was authorized to cause the fort St. Charles to be demolished, and the navy yard in the *city to be discontinued ; and the lot of ground on which the fort stood was appropriated to the use of a public square, to be improved as the corporation of the city should think proper. These acts related to lots within the common of the city ; though but few of them are included in that part of the ground respecting which this suit was commenced.

These official acts of the federal government, by legislation and otherwise, respecting the common claimed by the city, and some of which were induced by the special application of the corporation, afford strong evidence, it is contended, not only of the right of the United States to the property in question, but that such right was fully recognised by the corporation. It must be admitted, that several of these acts are unequivocal in their character, and do show, as contended by the attorney-general, an admission, on the part of the city, not only that congress had a right to legislate on this subject, but also to dispose of certain parts of the common in fee. And

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these acts, if unexplained, do strengthen the argument against the claim set up by the city.

It is a principle sanctioned as well by law as by the immutable principles of justice, that where an individual acts in ignorance of his rights, he shall not be prejudiced by such acts. And this rule applies at least with as much force to the acts of corporate bodies, as to those of individuals. We will, therefore, inquire, as we are bound to do, whether, under the circumstances of this case, the acts of the city can, justly, be considered as prejudicing the claim which they assert.

In the first place, the fact that when we obtained possession of Louisiana, the city of New Orleans was composed of citizens who, in their language, habits of thinking, and acting, were almost as dissimilar from other parts of the United States, as if they had inhabited a different continent, is of great importance; and, above all, they were unacquainted with the nature of our government, in a great degree, and the principles of our jurisprudence. They may be supposed to have been acquainted with the civil law, and to some extent, at least, with their rights as recognised and sanctioned by the law and usages of Spain. It is well known, that the policy of Spain in regard to a disposition of her public domain, is entirely different to that which has been adopted by the United States. We dispose of our public lands by sale; but Spain has uniformly bestowed her domain in reward for *meritorious services, or to encourage some enterprise [*736 deemed of public utility. That a community, composed, as were the citizens of New Orleans, almost entirely of foreigners, and under the circumstances which existed, should have mistaken their rights, is not extraordinary. Indeed, it would have been a matter of surprise, if they had, under the new system, understood the extent of their claim. They did exhibit their claim to the commissioners, who rejected it. And this, no doubt, induced the corporation to make the applications to congress which have been noticed. But in addition to the consideration, that the city authorities probably acted in ignorance of their rights, it may be safely assumed, that they had not the power, by the acts referred to, to divest the city of a vested interest in this common.

We come now to inquire, whether any interest in the vacant space in contest, passed to the United States under the treaty of cession. In the second article of the treaty, "all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices, which are not private property," were ceded. And it is contended, as the language of this article clearly includes the ground in controversy, whether it be considered a public square or vacant land, the entire right of the sovereign of Spain passed to the United States.

The government of the United States, as was well observed in the argument, is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power. If the common in contest, under the Spanish crown, formed a part of the public domain or the crown lands, and the king had power to alien it, as other lands, there can be no doubt, that it passed under the treaty to the United States, and they have a right to dispose of it, the same as other public lands. But if the king of Spain held the land in trust, for

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the use of the city, or only possessed a limited jurisdiction over it, principally, if not exclusively, for police purposes, was this right passed to the United States under the treaty? That this common, having been dedicated to public use, was withdrawn from commerce, and from the power of the king rightfully to alien it, has already been shown; and also, that he had a limited power over it, for certain purposes. Can the federal [737] *government exercise this power? If it can, this court has the power to interpose an injunction or interdict to the sale of any part of the common by the city, if they shall think that the facts authorize such an interposition.

It is insisted, that the federal government may exercise this authority, under the power to regulate commerce. It is very clear, that as the treaty cannot give this power to the federal government, we must look for it in the constitution; and that the same power must authorize a similar exercise of jurisdiction over every other quay in the United States. A statement of the case is a sufficient refutation of the argument.

Special provision is made in the constitution, for the cession of jurisdiction from the states over places where the federal government shall establish forts, or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction.

The state of Louisiana was admitted into the Union, on the same footing as the original states. Her rights of sovereignty are the same, and by consequence, no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust, and prevent what they shall deem a violation of it by the city authorities. All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people.

It is enough for this court, in deciding the matter before them, to say, that in their opinion, neither the fee of the land in controversy, nor the right to regulate the use, is vested in the federal government; and consequently, that the decree of the district court must be reversed, and the cause remanded with directions to dismiss the bill.

As it is not necessary, we do not decide on the right of the corporation to sell any part of the common, or to appropriate it in any other manner than as originally designated.

THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the eastern district of Louisiana, and [738] was argued by counsel: On consideration whereof, it is *ordered, adjudged and decreed by this court, that the decree of the said district court in this cause be and the same is hereby reversed and annulled. And this court, proceeding to render such decree as the said district court ought to have rendered in the premises, doth order, adjudge and decree, that the bill of the complainant in this cause be and the same is hereby remanded to the said district court of the United States for the eastern district of Louisiana, with directions to the said district court to carry this decree into effect.

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1. In the case of the United States *v. Tingey*, 5 Pet. 118, it was held, that the United States, being a body politic, as an incident to their general right of sovereignty, have a capacity to enter into contracts, and take bonds, in cases within the sphere of their constitutional powers, and appropriate to the just exercise of those powers, through the instrumentality of the proper department to which those powers are confided, whenever such contracts or bonds are not prohibited by law; although the making of such contracts, or taking such bonds, may not have been prescribed by any pre-existing legislative act. From the doctrine here stated, the court have not the slightest inclination to depart; on the contrary, from further reflection, they are satisfied that it is founded upon the soundest principles of law, and the just interpretation of the constitution.
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2. The act of congress of 1816 nowhere declares that all other bonds, not taken in the prescribed form, shall be utterly void; nor does such an implication arise from any of the terms contained in the act, or from any principles of public policy which it is designed to promote. A bond may, by mutual mistake or accident, and wholly without design, be taken in a form not prescribed by the act; it would be a very mischievous interpretation of the act, to suppose, that under such circumstances, it was the intentment of the act, that the bond should be utterly void; nothing but very strong and express language should induce a court of justice to adopt such an interpretation; where the act speaks out, it would be our duty to follow it; where it is silent, it is a sufficient compliance with the policy of the act, to declare the bond void as to any conditions which are imposed upon a party, beyond what the law requires; this is not only the dictate of the common law, but of common sense.....*Id.*

CERTIFICATE OF DIVISION.

1. Although the words of the act of congress are general, that whenever any question shall occur before a circuit court, upon which the opinion of the judges shall be opposed, the point shall be certified, &c.; yet it is very certain, that this cannot embrace every question that may arise in the progress of a cause, from its commencement; there may be many motions made in the different stages of a cause, before trial, that could not be brought here under a certificate of division; such as motions for amendments, for commissions, for continuances, &c., and various other motions that arise in the progress of a suit; which, if brought up in this manner, would occasion great delay and expense; these, and all other questions resting in the discretion of the circuit court, are not to be reviewed here. *Davis v. Braden*.....*286
2. The questions which may be certified, are those which may arise on the trial of a case, and are such as may be presented upon the final hearing of a cause, or pleas to the jurisdiction of the court; the motion in the present case does not stand on stronger grounds than a motion for a new trial; and it has been decided in this court, in the case of *United States v. Daniel*, 6 Wheat. 542, that a division of opinion upon such a motion cannot be brought here by a certificate of a division of opinion in the circuit court; and the reason assigned is, that the granting or refusing a new trial is a mere matter of discretion; and the refusal, although the grounds of the motion be spread upon the record, is no sufficient cause for a writ of error; the effect of the division is, that the motion is lost: so, in the present case, the effect of the division of opinion is, that the motion is lost, and the plaintiff is driven to a new suit.....*Id.*
3. The court do not mean to decide, definitively, that no question can be brought here upon a certificate of a division of opinion, unless the point arose upon the trial of the cause; but are very much induced to think, that such is the true construction of the act; but from the general words used, cases may possibly arise that we do not foresee. *Id.*
4. A question whether a plaintiff in ejectment shall be permitted to enlarge the term in the demise, is one within the discretion of the court to which a motion for the purpose is submitted; and cannot be certified to the supreme court, if the judges of the circuit court are divided in opinion on the motion, under the provisions of the act of congress of the 29th of April 1802. *Smith v. Vaughan*.....*366
5. Questions respecting the practice of the circuit court, in equity causes, which depend upon the exercise of the sound discretion of the court, in the application of the rules which regulate the course of equity proceedings, to the circumstances of such particular case; are not questions which can be certified, on a division of opinion of the judges of the circuit court, under the act of 1802, ch. 32. *Packer v. Nixon*.....*403

CHAMPERTY AND MAINTENANCE.

See *Boone v. Chiles*, *177.

CHANCERY AND CHANCERY PRACTICE.

1. The complainants filed a bill in the circuit court of Kentucky, claiming a conveyance of the legal title, and an account of rents and profits, of a tract of land, the legal title to which was derived, in virtue of the law of Virginia, under a settlement and a pre-emption right, held by Reuben Searcy; the latter gave his bond to Hoy, to make a deed of one-half of the land to which he was thus entitled; the other half having been given by him to one Martin, to obtain the location and patenting; he afterwards gave the plats and surveys to Hoy, who, in 1785, obtained a patent for the land, which he was to have a deed for; Hoy, in 1781, assigned the bond of Searcy to George Boone, and made himself surety for its performance; and George Boone assigned the bond to Thomas Boone, the ancestor of the complainants. Thomas Boone lived in the state of Pennsylvania, and was in Kentucky in 1802, 1810 and 1819, in the neighborhood of the land; but while there, he took no measures, personally, to obtain the title or possession of it; in 1787, he gave to George Boone a power of attorney to obtain a conveyance of the land; and in 1802, he made a conditional sale of it to Hezekiah Boone; the condition was not performed by Hezekiah Boone; so that, under the agreement, he obtained no right to the land. Possession was taken of parts of the land, and improvements made, as early as, or before, 1806, and the persons in possession were among the defendants. George Boone exceeded his powers, and made agreements to sell the land; and also agreed to give up to one of the heirs of Hoy, Searcy's bond; and some of the heirs sold parts of the land to the persons in possession, asserting a right to the legal title; and another of the heirs sold, by a quite-claim deed, all her rights, as one of the heirs of Hoy, to Green Clay. Afterwards, William Chiles, alleging that he had obtained from George Boone, and from Hezekiah Boone, the conditional purchaser, the equitable right of Thomas Boone, under Searcy's bond, filed, in the name of Thomas, George and Hezekiah Boone, and in his own name, in the county court of Bourbon county, a bill against the heirs of Hoy, the persons in possession, and against Green Clay, alleging him to be a purchaser, with notice of Thomas Boone's equitable title under Searcy and Hoy; and obtained from that court a decree for a conveyance to him of the legal title, and afterwards a deed for

the same, from a commissioner appointed to execute the same; this decree was afterwards, on appeal, reversed for informality; but before the same was reversed, the complainants filed this bill, asking for a conveyance from Chiles of all the title he held in the land, either under the decree, or in any other manner. Chiles, after the bill was filed purchased from Green Clay the rights he held; and, in his answer, alleged him to have been an innocent purchaser, without notice; the persons in possession, who purchased from Chiles, after the decree of the Bourbon court, answered, asserting their possession, and that they were protected by the statute of limitation; and submitted to such rules and regulations, according to law and equity, as the case might require. In 1822, Thomas Boone made an agreement with Boone Engles, by which the latter took upon himself the institution and conducting of this suit, for a portion of the benefit to the derived from it; and this the persons in possession alleged to be chameerty. The court decreed a conveyance by Chiles, and by others who held the legal title, to be made to the complainants, of all the lands unsold, and not in the possession of others; and that those who were in possession, who had purchased from Chiles, should pay to the complainants the sums which they agreed to pay, respectively, with interest, according to their respective contracts. *Boone v. Chiles*.....*177

2. A party is not allowed to state one case in a bill or answer, and make out a different one by proof; the *allegata* and *probata* must agree; the latter must support the former. *Id.*
3. It is a general principle, in courts of equity, that, where both parties claim by an equitable title, the one who is prior in time is deemed the better in right; and that where the equities are equal in point of merit, the law prevails.....*177
4. Tenants in possession of land, of which the complainants claimed a conveyance of the legal title, were made parties to the proceeding, by an amended bill; the original bill having charged that the land had been occupied by them for ten or twelve years, as the tenants of the holder to the legal title; they were not charged with fraud, nor were they placed in any such relation to the land. No case exists, as to the tenants, for the interference of a court of equity, whether they occupied the lands, as the tenants of the holder of the legal title, as declared in the original bill, or as tenants in possession under another; the complainants are to be supposed to have their remedy at law, for the recovery of the land, until they shall charge and show that the tenants obtained, and re-

- tain possession in contravention of some equity subsisting between them and the complainants. *Ringo v. Binns*.....*269
5. The rule to be applied to a bill seeking a discovery from an interested party, is, that the complainant shall charge in his bill, that the facts are known to the defendant, and ought to be disclosed by him; and that the complainant is unable to prove them by other testimony; and when the facts are desired to assist a court of law in the progress of a cause, it should be affirmatively stated in the bill, that they are wanted for such purpose. *Brown v. Swann*.....*497
6. The general rule is, that after a verdict at law, a party comes too late with a bill of discovery; there must be a clear case of accident, surprise or fraud, before equity will interfere; such now is the established doctrine in England, and has been, for a longer time, the doctrine in the United States. And the doctrine, as applied to a case for relief from usury, is, that a defendant sued at law on a contract alleged to be usurious, will not be entitled to a bill of discovery, if he suffers a verdict and judgment to be taken against him; and especially, when he does so, without making a defence at law. The reason of the rule is, that the proof of usury is a good defence at law; and when it is in the knowledge of the defendant, no satisfactory reason can be given, why the discovery was not sought, while the suit was pending. *Brown v. Swann*.....*497
7. Whenever a party seeking a discovery had knowledge of the facts, during the pendency of a suit at law, equity will not permit him to do so afterwards, to enjoin a judgment.....*Id.*
8. A filed a bill in the circuit court, for an injunction to prevent the sale of property by a trustee, to whom it had been conveyed to secure the payment of a sum of money borrowed by him at usurious interest; the money borrowed had not been repaid; and the bill sought no discovery of the usury from the defendant, but averred, that the complainant would be able to prove it by competent testimony; the circuit court dismissed the bill: *Held*, that the decree of the circuit court was correct. *Stanley v. Gadsby*.....*521
9. The case of *Stanley v. Gadsby* is substantially an application for relief from usury; and the consequence of granting the injunction would be, relief upon terms at variance with the rule of equity so fully recognised at this term of the court, in the case of *Brown v. Swann*: that he who seeks the aid of equity to be delivered from usury, must do equity, by paying the principal and legal interest upon the money borrowed; the complainant does not offer to do so in this bill. This is essential to every such application in a court of equity: first, to give the court jurisdiction; and to enable the chancellor, if he thinks proper to do so, to require the payment of principal and interest before the hearing of the cause; the relief sought in such cases is an exemption from the illegal usury; the whole inquiry, on the hearing, is to establish that fact; and to give relief to that extent; whenever a complainant does not comply with the rule, by averring in his bill his readiness or willingness to pay principal and interest, he can have no standing in a court of equity.....*Id.*
10. It is a well-settled rule in chancery, in the construction of wills, as well as other instruments, that when land is directed to be sold and turned into money, or money is directed to be employed in the purchase of lands; courts of equity, in dealing with the subject, will consider it that species of property into which it is directed to be converted. *Peter v. Beverly*.....*532
11. Distribution of assets of the estate of an intestate.....*Id.*

See HUSBAND AND WIFE.

CHARGE OF THE COURT.

1. A court may not only present the facts proved, in their charge to the jury, but give their opinion as to those facts, for the consideration of the jury; but, as the jurors are the triers of facts, such an expression of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments; they should be made distinctly to understand, that the instruction was not given as a point of law, by which they were to be governed; but as a mere opinion as to the facts; and to which they should give no more weight than it was entitled to; the correctness of every charge must depend upon the phraseology used by the court. *Tracy v. Smartwood*.....*80
2. The court are not bound to charge the jury on points of law, which do not grow out of the facts proved on the trial of the cause. *Clarke v. Kownslar*.....*657
3. The circuit court was required to instruct the jury upon points of law, growing out of allegations of facts, of which there was no evidence: the refusal of the court to do so was correct.....*Id.*

COLLECTOR OF DUTIES.

1. When a collector of the public revenue is liable for acts which are not authorized by a sound construction of the laws relating to

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- duties on merchandise imported. *Tracy v. Swartwout*.....*80
2. The collector has a right to hold possession of imported goods, until the duties are paid, or secured to be paid, as the law requires ; but, if he retain possession of the goods, and refuse to deliver them, after the duties are paid, or bond given or tendered, for the proper rate of duties ; he is liable for the damages which may be sustained by this refusal*Id.*
3. A collector of the revenue is not personally liable, in an action to recover back an excess of duties paid, as collector, and by him, in the regular or ordinary course of his duty, paid into the treasury of the United States ; he, the collector, acting in good faith, and under instructions from the treasury department, and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount, given him. *Elliott v. Swartwout*.....*187
4. In a case of voluntary payment, by mere mistake of law, no action will lie to recover back the money ; the construction of the law is open to both parties, and each presumed to know it.*Id.*
5. Any instructions of the treasury department to a collector, cannot change the law, nor affect the rights of a party injured by them ; he is not bound to take and adopt that construction ; he is at liberty to judge for himself, and act accordingly. These instructions from the treasury seem to be thrown into the question, in this case, for the purpose of showing, beyond all doubt, that the collector acted in good faith. To make the collector answerable, after he had paid over the money, without any intimation having been given, that the duty was not legally charged, cannot be sustained, upon any sound principle of policy or of law ; there can be no hardship in requiring the party to give notice to the collector, that he considers the duty claimed illegal ; to put him on his guard, by requiring him not to pay over the money ; the collector would then be placed in a situation to claim an indemnity from the government ; but if the party is entirely silent, and no intimation of an intention to seek a repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the government to indemnify him against a suit. It is no sufficient answer to this, that the party cannot sue the United States ; it is the case of a voluntary payment, under a mistake of law, and the money paid over into the treasury ; and if any redress is to be had, it must be by application to the favor of the government, and not on the ground of a legal right*Id.*
6. The collector is personally liable, in an action to recover back an excess of duties paid to him as collector, and by him paid over, in the regular and ordinary course of his duty, into the treasury of the United States ; he, the collector, acting in good faith, and under instructions from the treasury department ; a notice having been given him, at the time of payment, that the duties were charged too high, and that the party paying, so paid, to get possession of his goods, and intended to sue to recover back the amount erroneously paid ; and a notice not to pay over the amount into the treasury.....*Id.*

COMMERCIAL GUARANTEE.

1. L., at Memphis, Tennessee, addressed a letter to D. & Co., at New Orleans, stating that N. & D. wished to draw on them for \$2000, saying, "please accept their draft, and I hereby guaranty the punctual payment of it." In a letter of the same date, to one of the firm of N. & D., he said, "I send a guarantee for \$2000 ; the balance I have no doubt your friend W. will do for you." N. & D. drew a bill on D. & Co., for \$4250, which they accepted ; and after having paid the draft, they gave notice to L. that they looked to him for the money ; no notice was given by D. & Co. to L. that they intended to accept, or had accepted, and acted upon the guarantee, before they paid the draft ; the drawers of the bill did not reimburse D. & Co. for any part of it. An action was instituted to recover \$2000 from L., being part of the bill for \$4250 : *Held*, that although the bill was drawn for \$4250, the guarantee would have operated to bind L. for the sum of \$2000 included in it, if notice of the acceptance of it had been given by D. & Co. to L. ; but having omitted to give such notice, or that they intended to accept, or had accepted and acted on the guarantee, L. was not liable to D. & Co. for any part of the bill for \$4250. *Lee v. Dick*.....*483
2. A guarantee is a mercantile instrument, and to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety.....*Id.*
3. If the guarantee stood alone, unexplained by the letter which accompanied it, it would undoubtedly be limited to a specific draft for \$2000, and would not cover that amount, in a bill for a larger sum ; but the letter which accompanied it fully justified the conclusion, that the defendant undertook to guaranty \$2000 in a draft for a larger amount.

- The letter and guarantee were both written by the defendant, on the same sheet of paper, bear the same date, and may be construed together as constituting the guarantee...*Id.*
4. The decision of the court in the case of *Douglas v. Reynolds*, 7 Pet. 125, affirmed. In that case, the court held, that a party giving a letter of guaranty has a right to know whether it is accepted; and whether the person to whom it addressed means to give credit on the footing of it or not; it may be most material, not only as to his responsibility, but as to future rights and proceedings; it may regulate, in a great measure, his course of conduct, and his exercise of vigilance in regard to the party in whose favor it is given; especially is it important, in case of a continuing guarantee, since it may guide his judgment in recalling or suspending it. The last remark by no means warrants the conclusion, that notice is not necessary in a guarantee of a single transaction; but only that the reason of the rule applies more forcibly to a continuing guarantee.....*Id.*
5. The same strictness of proof of notice is not necessary, to charge a party upon his guarantee, as would be necessary to support an action upon the bill itself, when, by the law-merchant, a demand upon and refusal by, the acceptors must be proved, in order to charge another party upon the bill. There are many cases, where the guarantee is of a specific existing demand, by a promissory note, or other evidence of a debt, and such guarantee, is given upon the note itself, or with a reference to it and recognition of it, when no notice would be necessary; the guarantor, in such cases, knows precisely what he guarantees, and the extent of his responsibility; and any further notice to him would be useless; but when the guarantee is prospective, and to attach upon future transactions, and the guarantor uninformed whether his guarantee has been accepted and acted upon, or not; the fitness and justice of the rule requiring notice is supported by considerations that are unanswerable.....*Id.*

CONSTITUTIONALITY OF STATE LAWS.

1. The power of the legislature of Rhode Island in relation to the confirmation of such sales of real estate, is greater than the strict judicial power; they may sanction past transactions, where vested rights are not disturbed; while the court can only authorize a title to be made in future. *Leland v. Wilkinson...**294

CONSTRUCTION OF FEDERAL STATUTES.

1. Specific questions arising in the circuit court in which the judges of the circuit court are divided in opinion, can only be certified under the act of congress of 1802; the whole case cannot be brought up upon a general question. *Harris v. Elliott*.....*25

CONSTRUCTION OF STATE LAWS.

1. Construction of the fourth section of the act of the assembly of Pennsylvania, passed the 15th of March 1815, providing for the sale of lands for taxes. *Dubois v. Hepburn*.....*1
2. Construction of the statutes of Virginia against usury. *Brown v. Swann*.....*497
3. Construction of the acts of the legislature of North Carolina and Tennessee, relative to registering and recording deeds for lands in Tennessee, in force in the state of Tennessee. *Dunn v. Reid*.....*524
4. Construction of the statute of Tennessee providing for the substitution of executors or administrators, when either party to a suit dies before judgment. *Davis v. Braden*. *286
5. The power to sue for debts due to the estate of an intestate is implied in the authority given to administrators *ad colligendum*, issued under the authority of the statute law of Mississippi.....*Id.*
6. Construction of the laws of Georgia, relative to the rights of aliens to real and personal estate which belonged to a citizen of Georgia who died intestate, leaving alien and citizen representatives of different degrees of kindred. *McLearn v. McLellan*.....*635

COUNTERFEITING.

1. The head pistareen is no part of the Spanish milled dollar; such pistareen, or piece of coin, is not a silver coin of Spain, made current by law in the United States. *United States v. Gardner*.....*618

DAMAGES.

1. When a collector or public officer is liable to an action for damages, for acts done in the course of the performance of the duties of his office. *Tracy v. Swartwout*.....*80
2. Some personal inconvenience may be experienced by a public officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but as the government, in such cases, is bound to indemnify the officer, there can be no eventual hardship. *Elliott v. Swartwout*.....*187

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DEDICATION.

1. The vacant land in front of the city of New Orleans, and on the Mississippi, was dedicated to the use of the city of New Orleans, before the cession of Louisiana to the United States, and having been so dedicated, did not become the property of the United States, when Louisiana was ceded by France; the alluvial deposits from the river Mississippi belonged to the owners of the land bounding on their river, to which additions were so made. *New Orleans v. United States*. *862
2. In order to dedicate property for public use, in cities and towns, and other places, it is not essential, that the right to use the same shall be vested in a corporate body; it may exist in the public, and have no other limitation than the wants of the community at large. *Id.*
3. The principles upon which the case of the city of Cincinnati *v. White*, 6 Pet. 481, and that of *Barclay v. Howell*, *Id.* 489, were decided, examined and affirmed. *Id.*
4. If buildings had been erected on lands within the space dedicated for public use, or grants of part of the same had been made by the power which had authority to make, and had made a dedication of the same to public use; the erection of the buildings and the making of the grants would not be considered as disproving the dedication, and the grants would not affect the vested rights of the public. *Id.*

DEMURRER.

1. It is an established rule in demurrers, that although the pleading demurred to may be defective, the court will give judgment against the party whose pleading was first defective in substance. *Spigg v. Bank of Mount Pleasant* *257

DEVASTAVIT.

See EXECUTOR.

DISTRIBUTION OF ASSETS.

1. A tract of land, in the state of Georgia, was purchased by A. McLearn, on which he established a rice plantation, put slaves upon it, paid part of the purchase-money, gave a judgment for the balance, and died, leaving a son, James H. McLearn, his devisee; who, to obtain possession of the estate, mortgaged the land and slaves for the balance of the judgment; a judgment, under the laws of Georgia, binds personal as well as real property. The son died, part of the debt being unsatisfied; leaving as his nearest of kin, aliens; and also more remote kindred; who

were citizens of the United States; the real estate was sold to satisfy, and did satisfy, the mortgage; the personal estate was sold by the executor; the aliens, who were nearest of kin, claimed the proceeds of the personal estate; the kindred of the deceased, who were more remote, but who were citizens of the United States, claimed that the personal estate should have been appropriated to pay the mortgage; and that not having been so appropriated, they were entitled to the money arising from its sale, to reimburse them for the value of the real estate taken by the mortgagor; the aliens nearest of kin not being entitled, by the law of Georgia, to take real estate by descent. The court held, that as both the real and personal estate had been charged with the mortgage debt, both funds must be applied, in proportion to their respective amounts, to its payment; any debt, not covered by the mortgage, to be paid out of the personal estate. The nearest of kin to take the residue of the proceeds of the personal estate, and the remoter kin, citizens of the United States, to take the residue of the proceeds of the real estate, and the real estate unsold. *McLearn v. McLellan*. *625

DUTIES ON IMPORTS.

1. When damages may be recovered from a collector of the revenue, for insisting on the payment of more duties than, by a sound construction of the law, goods are liable for, and detaining the goods for such unlawful claim. *Tracy v. Swartwoot*. *80
2. Under the act of congress, passed on the 14th of July 1832, entitled "an act to alter and amend the several acts imposing duties on imports," worsted shawls with cotton borders, and worsted suspenders with cotton straps or ends, are not subjected to a duty of fifty per centum *ad valorem*. *Elliott v. Swartwoot*. *187
3. Laws imposing duties on the importation of goods, are intended for practical use and application by men engaged in commerce; and hence it has become a settled rule in the interpretation of statutes of this description, to construe the language adopted by the legislature, and particularly in the denomination of articles, according to the commercial understanding of the terms used.... *Id.*

See COLLECTOR OF DUTIES.

EQUITY.

1. The purchasers of land of which they were in possession, under a supposed legal title, obtained by their vendor, by improper means,

and which title was afterwards declared to inure to the holders of the superior equitable title, who had failed to prosecute their claims for upwards of thirty years, were confirmed in their titles, and adjudged to pay the purchase-money of the land to the holders of the superior equitable title. *Boone v. Chiles*.....*177

See CHANCERY AND CHANCERY PRACTICE.

ERROR.

1. It is incumbent on a plaintiff in error, to make out an alleged error, clearly and satisfactorily; every reasonable intendment should be in favor of a judgment of a court. *Ventress v. Smith*.....*161

EVIDENCE.

1. On the trial of an action against a collector of duties, for not having delivered goods to the importer, it appeared, that the collector had insisted on a bond being given for a greater amount of duties than the goods were lawfully subjected to; the plaintiff offered evidence to prove that he was unable to give the bond in the large amount required; he had not made known this inability to the collector when the bond was insisted upon. The evidence was properly refused. *Tracy v. Swartwout*.....*80
 2. The defendant, in an action against him by the United States, upon a treasury-transcript, or official bond, or in any suit for the recovery of money claimed by the United States, may give in evidence of a set-off, any claims to credits which have been exhibited to the accounting officers, after the commencement of the suit, and before the trial. *United States v. Hawkins*.....*125
 3. Copies of records of the proceedings in a state court, which showed that a suit was still pending in the court where the copy was certified, but which were given at a period anterior to the trial of a case in which they were offered in evidence, and in the interval, the case, from the course of the court in which it was depending, might have been decided, were allowed to be read in evidence; from which the jury might infer the suit was depending and undetermined. *Hagan v. Lucas*.....*400
 4. Hearsay evidence. *Elliott v. Pearl*...*412
 5. The general rule is, that evidence, to be admissible, should be given under the sanction of an oath, legally administered; and in a judicial proceeding, depending between the parties affected by it, or those who stand in privity of estate or interest with them.
- Hearsay is admitted in cases of pedigree, of prescriptive rights and customs, and some other cases of a public, or *quasi* public nature; in a case of pedigree, it is admitted, upon the ground of necessity, or the great difficulty, and sometimes the impossibility of proving remote facts of this sort by living witnesses; but in these cases, it is only admitted, when the tradition comes from persons intimately connected, or in close relation, with the family, or from sources of a kindred nature; which, in a general sense, may be said to import verity; there being no *lis mota* or other interest, to affect the credit of their statement*Id.*
6. In cases of prescriptive rights and customs, and other claims of a public nature, tradition and reputation have been, in like manner, admitted; they are all cases of a general right, affecting a number of persons, having a common interest.....*Id.*
7. The mortgagee of property insured against loss by fire, is a competent witness, in an action against the insurers, to recover a loss, alleged to have been sustained by the destruction of the property insured. *Columbia Insurance Co. v. Lawrence*.....*507
8. The army registers, published by the adjutant and inspector-general of the army, containing the general regulations of the army, which are delivered by the departments to the officers of the army, are not evidence to establish the pay and emoluments of officers in the service; these are fixed and determined by acts of congress. *Wetmore v. United States*.....*647
9. The registers are compilations issued and published to the army, by the direction of the secretary at war, in the exercise of his official authority; and when authenticated by him, would be evidence of the facts, strictly so, they may contain; such as the names of officers, date of commissions, promotions, resignations, and regimental rank, brevet and other rank, or the department of the army to which officers belong; but from none of these can an inference be drawn by a jury, to establish the pay and emoluments of officers; as they are provided for by law, and must be determined by the court, when they are doubtful, and the subject of dispute in a case between an officer and the United States. Nor can such registers be evidence of the correctness of any classification of the officers of departments into the general staff of the army; for though they are probably correct, being prepared by persons whose professional duty it is to be well informed upon the subject, and who, for their familiarity with military science and the general arrangement of armies, are supposed to be

expert interpreters of the acts of congress for the organization of our army; still, what officers are of the staff, or general staff, depends upon acts of congress, which are to be expounded by the courts, when an officer claims a judicial determination of his rights as to pay and emoluments from his having been arranged as belonging to the staff. .*Id.*

EXECUTION.

1. Property once levied on, remains in the custody of the law, and it is not liable to be taken by another execution, in the hands of a different officer; and especially, by an officer acting under a different jurisdiction.
Hagan v. Lucas.....*400
2. Personal property was levied on by a sheriff, under the judgment of the state court of Alabama, and was, according to the provisions of the law of that state, delivered to a person claiming the title to it against the defendant in the execution, and who gave bond to the sheriff for the same; the marshal of the United States, under an execution issued against the same defendant, on a judgment obtained in the court of the United States, levied on the property in the hands of the claimant, before the validity of his claim was decided. A most injurious conflict of jurisdiction would be likely often to arise between the federal and the state courts, if the final process of the one could be levied on property which had been taken by the process of the other; the marshal or the sheriff, as the case may be, by a levy, acquired a special property in the goods, and may maintain an action for them; but if the same goods may be taken in execution, at the same time, by the marshal and the sheriff, does this special property vest in the one or the other, or both of them? No such case can exist; property once levied on, remains in the custody of the law, and it is not liable to be taken by another execution, in the hands of a different officer; and especially, by an officer acting under a different jurisdiction.....*Id.*
3. On the giving of the bond, the property is placed in the possession of the claimant; his custody is substituted for the custody of the sheriff; the property is not withdrawn from the custody of law; in the hands of the claimant, under the bond for its delivery to the sheriff, the property is as free from the reach of other processes, as it would have been in the hands of the sheriff.....*Id.*
4. Under the state jurisdiction, a sheriff, having execution in his hands, may levy on the same goods; and where there is no prior claim, on the sale of the goods, the proceeds

should be applied in proportion to the sums named in the executions; and where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain, after satisfying the first levy, by the order of the court. But the same rule does not govern, where the executions, as in the present case, issue from different jurisdictions; the marshal may apply moneys collected under several executions, the same as the sheriff; but this cannot be done as between the marshal and the sheriff.*Id.*

EXECUTORS AND ADMINISTRATORS.

1. If executors have paid a debt to banks, or the banks have accepted their note in payment, in place of the notes of the testator, so that the executors became the debtors, and personally responsible to the banks; the only effect of this is, that the executors became the creditors of the estate, instead of the banks, and may resort to the trust fund to satisfy the debt. *Peter v. Beverly*..*582
2. It is a well-settled rule, that one executor is not responsible for the *devastavit* of his co-executor, any further than he is shown to have been knowing and assenting, at the time, to such *devastavit* or misapplication of the assets; merely permitting his co-executor to possess the assets, without going further and concurring in the application of them, does not render him answerable for the receipts of his co-executor; each executor is liable only for his own acts, and what he receives and applies; unless he joins in the direction and misapplication of the assets.....*Id.*
3. Executors and administrators, in making sales of property, must comply strictly with the requisites of all statutory provisions on the subject; and unless every essential direction of the law is complied with, all whose interests are affected by the authority to sell are not concluded by the sale, unless, from a long acquiescence, a foundation is laid for a fair and reasonable presumption, that the requisites of the law had been complied with; no such presumption can arise in this case. It is a general rule of law, that a sale by a person who has no right to sell, is not valid against the rightful owner. *Ventress v. Smith*.....*161
4. Authority given to executors and administrators to sell, is a personal trust, and must be strictly pursued; and if they transcend their authority, in any essential particular, their act is void.....*Id.*
5. Administrator *ad colligendum*.....*Id.*
6. The administrator in Alabama, is authorized

to sell and dispose of the personal estate of an intestate, by public sale, at auction, under an order of court, and after notice according to the provisions of the law. A purchase at private sale was made, *bond fide*, of slaves belonging to the estate, from the administrator; the sale was void under the laws of Alabama..... *Id.*

EXTINGUISHMENT.

1. It is a settled doctrine, that the acceptance of a negotiable note for an antecedent debt, will not extinguish the debt; unless it be expressly agreed, that it is received as payment. *Peter v. Beverly*.....*532

FEME SOLE.

See HUSBAND AND WIFE.

FLORIDA, LOUISIANA AND MISSOURI LAND-CLAIMS.

1. A grant of land in Florida, within the Indian boundary, by the governor acting under the crown of Spain, before the cession of Florida to the United States, was confirmed to the grantee, by the decree of the judge of the eastern district of Florida; the decree was affirmed on appeal. *United States v. Fernandez*.....*303
2. The subject of grants of land within the Indian boundary, which had not, by any official act, been declared a part of the royal domain, was fully and ably considered in the case of *Johnson v. McIntosh*, 8 Wheat. 548. Every European government claimed and exercised the right of granting lands, while in the occupation of the Indians..... *Id.*
3. The grants of land, in the possession of the Indians, by the governor of Florida, under the crown of Spain, were good, to pass the right of the crown; the grants severed them from the royal domain, so that they became private property; which was not ceded to the United States by the treaty with Spain. *Id.*
4. This court cannot attach any condition to a grant of absolute property in the whole of the land. This grant was made by the governor of East Florida, in absolute property, with a promise of a title in form; he was the exclusive judge of the conditions to be imposed on his grant, and of their performance. *United States v. Segui*.....*806
5. A grant of land, by the governor of East Florida, in consideration of services to the Spanish government, made before the cession of the territory of Florida to the United States, confirmed. *United States v. Chaires*.....*808
6. Under a grant of the governor of Florida, prior to the cession of the same to the United States, of 16,000 acres of land, for the purpose of erecting a water-mill, a survey of 520 acres was made; and at another place, a survey of 16,680 acres was also made. The court held, that the first survey of 520 acres was valid, and that the survey of 15,480 acres was invalid; but that the grantee had a title to 15,480 acres of vacant land; which he had a right to have surveyed, adjoining the survey of 520 acres. *United States v. Seton*.....*309
7. Under a Spanish grant of five miles square, 10,000 acres were surveyed at one place, and 6000 acres were surveyed at another place, as the whole quantity of ungranted land could not be found together. The grant was confirmed. *United States v. Sibbald*.....*813
8. On the 18th of April 1802, the lieutenant-governor of Upper Louisiana granted 1600 arpents of land, near certain rivers named in the grant, with directions to survey the same in a vacant place of the royal domain; but no survey was made before the cession of Louisiana to the United States. As the grant contained no description of the land granted, and was not located within the time prescribed by the act of congress of the 10th of March 1804, it comes directly within the point decided by this court in the case of John Smith, T. and cannot be confirmed. *Wherry v. United States*.....*388
9. In repeated decisions, the supreme court have affirmed the authority of local governors, under the crown of Spain, to grant land in Louisiana, before the same was ceded by Spain to France: and the court have also affirmed the validity of descriptive grants, though not surveyed before the 11th of March 1854, in Missouri, and the 24th of January 1818, in Florida. *Mackey v. United States*.....*840
10. John Smith, T., claimed a confirmation of a grant of land by the governor-general of Louisiana, made on the 11th of February 1790; Louisiana was ceded by France to the United States, by the treaty 1803; in 1811, surveys were made under the grant, of several tracts of land, varying in numbers of acres, and several of them including lead mines; no survey of any land was made under the grant, until after the treaty of cession. By the decree of the district court, the claim was rejected; the decree was affirmed. *Smith v. United States*.....*326

FLORIDA TREATY.

1. By the eighth article of the treaty ceding

- Florida to the United States, the same time is allowed to the owners of land granted under the authority of Spain, to fulfil the conditions of their grants, after the date of the treaty, as was limited in the grants. It has been decided by this court, in the case of *Arredondo*, that as to individual rights, the treaty is to be considered as dated at its ratification. *United States v. Gibbald*.....*818
2. It has been decided in *Arredondo's* case, that that provision of the treaty as to the performance of the conditions in grants, is not confined to owners of land by occupancy or residence; but extends to persons who have a legal seisin and possession of land, in virtue of a grant; and that, in the situation of the province, and the claimants to land at the time of the cession, it was enough, that they should show a performance of the condition *cum pres*.....*Ia.*

GEORGIA.

1. Construction of the laws of Georgia, relating to the claims of aliens on the estate of an intestate, a citizen of the United States. *McLearn v. McLellan*.....*625

GRANT.

1. It would be a dangerous doctrine, to consider the issuing of a grant, as conclusive evidence of a right in the power which issued it; on its face, it may be conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantees. *New Orleans v. United States*.*662

GRANTS WITHIN THE INDIAN BOUNDARY.

See FLORIDA LAND-CLAIMS, 8.

GUARANTEE.

See COMMERCIAL GUARANTEE.

HUSBAND AND WIFE.

1. Agreements between husband and wife, during coverture, for the transfer by him of property, directly to the latter, are undoubtedly void at law; equity examines them with great caution, before it will confirm them; but it does sustain them, when a clear and satisfactory case is made out, that the property is to be applied to the separate use of the wife; where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's

benefit, or of their family; or which has been appropriated by him to his uses; where the husband is in a situation to make a gift of property to the wife, and distinctly separates it from the mass of his property for her use; either case equity will sustain, though no trustee has been interposed to hold for the wife's use. *Wallingford v. Allen*.....*563

INFANT AND INFANCY.

1. What acts of an infant are actually void and what are voidable. *Tucker v. Moreland*.....*5
2. What acts of an infant become confirmed by their recognition after he becomes of full age.....*Id.*
3. In what cases, an infant may bind himself by deed.....*Id.*
4. How the deeds of an infant are to be disaffirmed, on his arrival at age.....*Id.*
5. How the acts of an infant shall or may be avoided, after he becomes of full age.....*Id.*
6. How the acts of an infant done, when pretending to be of full age, operate to bind him after full age

INSOLVENT LAW OF LOUISIANA.

1. A creditor who has not been served with notice of an application by his debtor for a respite, under the insolvent law of Louisiana, is in no sense a party to the proceedings, and his rights were in no sense affected by them. *Haydel v. Girod*.....*283

INSURANCE AGAINST FIRE.

1. The decision of this court in the case of *Lawrence v. Columbia Insurance Co.*, 2 Pet. 47, referred to; and the principles laid down in that case relative to representations by the assured to the insurers, re-affirmed. *Columbia Insurance Co. v. Lawrence*.....*507
2. The decision of this court in 2 Pet. 26, 53, 56, as to the effect of a misdescription of property insured, on the liability of insurers against loss by fire, re-affirmed.....*Id.*

INTESTACY.

1. Distribution of assets of the estate of an intestate among alien and citizen representatives. *McLearn v. McLellan*.....*625

JUDICIAL PROCEEDINGS.

1. There is no principle of law better settled than that every act of a court of competent

- jurisdiction, shall be presumed to have been rightly done, till the contrary appears; this rule appears as well to every judgment or decree rendered, in the various stages of their proceedings, from the initiation to their completion; as to their adjudication that the plaintiff has a right of action; every matter adjudicated becomes a part of their record; which thenceforth proves itself, without referring to the evidence on which it has been adjudged. *Voorhees v. Bank of United States* *449
2. That some sanctity should be given to judicial proceedings; some time limited, beyond which they should not be questioned; some protection afforded to those who purchase at sales by judicial process; and some definite rules established, by which property thus acquired may become transmissible, with security to the possessors, cannot be denied. In this country, particularly, where property, which, within a few years, was but of little value, in a wilderness, is now the site of large and flourishing cities; its enjoyment should be at least as secure, as in that country where its value is less progressive. *Id.*
3. It is among the elementary principles of the common law, that whoever would complain of the proceedings of a court, must do it in such time as not to injure his adversary by unnecessary delay in the assertion of his right. If he objects to the mode in which he is brought into court, he must do it, before he submits to the process adopted; if the proceedings against him are not conducted according to the rules of law and the court, he must move to set them aside for irregularity; or, if there is any defect in the form or manner in which he is sued, he may assign those defects specially, and the court will not hold him answerable till such defects are remedied. But if he pleads to the action generally, all irregularity is waived; and the court can decide only on the rights of the parties to the subject-matter of controversy; their judgment is conclusive, unless it appears on the record, that the plaintiff has no title to the thing demanded, or that in rendering judgment they have erred in law; all defects in setting out a title, or in the evidence to prove it, are cured; as well as all irregularities which may have preceded the judgment. *Id.*
4. So long as a judgment remains in force, it is, in itself, evidence of the right of the plaintiff to the thing adjudged, and gives him a right to process to execute the judgment; the errors of the court, however apparent, can be examined only by an appellate power; and by the laws of every country, a time is fixed for such examination, whether in rendering judgment, issuing execution, or enforcing it by process of sale or imprisonment; no rule can be more reasonable, than that the person who complains of an injury done him, should avail himself of his legal rights, in a reasonable time, or that that time should be limited by law. *Id.*
5. The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity, collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record, importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings, which are irreversible for error; such is their effect between the parties to the suit; and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution. *Id.*

JURISDICTION.

1. The *onus probandi* of the amount in controversy, to establish the jurisdiction in a case brought before the supreme court by writ of error, is upon the party seeking to obtain a revision of the case; he must prove that the value exceeds \$2000, exclusive of costs. In this case, the matter in question is the ownership of one negro woman and two children, who are slaves, and it is not supposed that their value can be equal to that sum. The writ of error was dismissed. *Hagan v. Faison*. *160
2. The 25th section of the judiciary act of 1789, confers appellate jurisdiction on the supreme court from final judgments and decrees, in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had, in three classes of cases: first, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; secondly, where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such, their validity; thirdly, where is drawn in question the construction of any clause of the constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either

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- party under such clause of the said constitution, treaty, statute or commission. The section then goes on to provide, that no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears upon the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions or authorities in dispute. *Crowell v. Randell*. *368
3. In the interpretation of the 25th section of the act of 1789, it has been uniformly held, that to give the supreme court appellate jurisdiction, two things should have occurred and be apparent in the record: first, that some one of the questions stated in the section did arise in the court below; and secondly, that a decision was actually made thereon, by the same court, in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails; it is not sufficient to show, that such a question might have occurred, or such a decision might have been made in the court below; it must be demonstrable that they did exist, and were made. *Id.*
4. It has been decided, that it is not indispensable, that it should appear on the record *in totidem verbis*, or by direct and positive statement, that the question was made, and the decision given by the court below on the very point; but that it is sufficient, if it is clear, from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment. *Id.*
5. A review of the cases of *Owings v. Norwood's Lessee*, 5 Cranch 344; *Smith v. State of Maryland*, 6 Ibid. 281; *Martin v. Hunter's Lessee*, 1 Wheat. 304; *Ingle v. Coolidge*, 2 Ibid. 363; *Miller v. Nichols*, 4 Ibid. 311, 315; *Williams v. Norris*, 12 Ibid. 117, 124; *Hickie v. Starke*, 1 Pet. 98; *Wilson v. Black-bird Creek Marsh Association*, 2 Ibid. 245, 250; *Satterlee v. Matthewson*, Ibid. 380; *Harris v. Dennie*, 3 Ibid. 292, 302; *Craig v. State of Missouri*, 4 Ibid. 410; *Fisher v. Cockerell*, 5 Ibid. 256; *City of New Orleans v. De Armas*, 9 Ibid. 234. *Id.*
6. In order to bring a case for a writ of error or an appeal to the supreme court, from a court of the highest jurisdiction of any of the states, within the 25th section of the judiciary act, it must appear on the face of the record: 1st, That some one of the questions stated in that section did arise in the state court: 2d, That the question was decided by the state court, as required in the same section. It is not necessary that the question should appear on the record to have been raised, and the decision made, in direct and positive terms, *ipsissimis verbis*; but it is sufficient, if it appears by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to have induced the judgment; it is not sufficient, to show that a question might have arisen or been applicable to the case, unless it be further shown on the record, that it did arise, and was applied by the state court to the case. *Id.*

JURISDICTION IN ERROR TO A STATE COURT.

See JURISDICTION: *Crowell v. Randell*, *368.

LANDS AND LAND TITLES.

1. The legislature of Kentucky passed an act by which a defective entry on land was made perfect; the agent of the holder of the defective title, after having become acquainted with its defect during his agency, took out a patent for the land in his own name. The court held, that the patent was void against the act of the legislature; and the holder of the patent was decreed to convey his legal title to the claimants, under the law of Kentucky. *Ringo v. Binns*. *269
2. Purchasers with or without notice of outstanding title. *Boone v. Chiles*. *177

SEE FLORIDA, LOUISIANA, AND MISSOURI LAND CLAIMS.

LIMITATION IN CHANCERY.

See *Boone v. Chiles*, *177.

MANUMISSION OF SLAVES.

1. Manumission of slaves, under the statute of Maryland of 1796. *Wallingford v. Allen*. *583
2. A wife, having separated herself from her husband, for ill-treatment by him, applied to the county court of Prince George, Maryland, for alimony, which was allowed to her, *pendente lite*; the husband gave the wife a female negro slave, and some other property in discharge of the alimony; she removed to Washington, hired out the slave; and afterwards, in consideration of a sum of money,

- and for other considerations, she manumitted, by deed, the slave, and her two infant children, the eldest not three years old; some time after the arrangement between the husband and wife, a final separation took place between them, by a verbal agreement; each to retain "the property each had, and to be quits for ever." and the wife relinquished all further claim for alimony; after the death of the wife, the husband claimed the female and her children as his slaves: *Held*, that they were free by virtue of the deed of manumission executed by the wife. *Id.*
3. It would be an unreasonable restraint upon the privileges of manumission, as it is granted in the Maryland law of 1796, if it were interpreted to exclude the manumission of mother and infant child, the former being of healthy constitution and able to maintain it, as of other children who, in natural progress of human life would be able, in a few years, to maintain themselves by labor, and who would find in their adolescence, persons who would gladly maintain them for the services they could render. *Id.*

MARKET OVERT.

1. It has sometimes been contended, that a *bond side* purchase for a valuable consideration, and without notice, was equivalent to a purchase in *market overt*, under the English law, and bound the property against the party who had right. This Saxon institution of *market overt*, which controls and interferes with the application of the common law, has never been recognised in any of the United States, or received any judicial sanction. *Ventress v. Smith*. *161

MORTGAGEE.

1. There is no principle of law or of equity by which a mortgagee has a right to claim the benefit of a policy, underwritten for the mortgagor, on the mortgaged property, in case of loss by fire; it is not attached, nor an incident to his mortgage; it is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor. *Columbia Insurance Co. v. Lawrence*. *507

PAYMASTERS.

1. A paymaster in the army of the United States, appointed under the act of congress passed the 24th of April 1816, is entitled to the pay and emoluments of a major of infantry, and not to those of a major of cavalry. *Watmore v. United States*. *647

PILOTS.

1. When pilots are entitled to be considered as salvors, and are entitled to salvage. *The Hope*. *108
2. Suits for pilotage on the high seas, and on waters navigable from the sea, as far as the tide ebbs and flows, are within the admiralty and maritime jurisdiction of the United States; the service is strictly maritime and falls within the principles already established by this court in the case of *The Thomas Jefferson*, 10 Wheat. 428, and *Peyroux v. Howard*, 5 Pet. 622. *Id.*

See SALVAGE.

PLEAS AND PLEADING.

1. No rule in pleading is better settled, or upon sounder principles, than that every plea, in discharge or avoidance of a bond should state positively and in direct terms, the matter in discharge or avoidance; it is not to be inferred *arguendo*, or upon conjecture. *United States v. Bradley*. *343

See CHANCERY AND CHANCERY PRACTICE:
DEMURRER.

POSSESSION OF LANDS.

1. The assumption that there can be no possession to defeat an adverse title, except in one or other of these ways, that is, by an actual residence, or an actual inclosure, is a doctrine wholly irreconcilable with principle and authority; nothing can be more clear, than that a fence is not indispensable to constitute possession of a tract of land; the erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property; but there are many other acts, which are equally evincive of such an intention of asserting such ownership and possession; such as entering upon land and making improvements thereon; raising a crop of corn; felling and selling the trees thereon, under color of title. *Ellicott v. Pearl*. *414
2. An entry into possession of a tract of land, under a deed containing specific metes and bounds, gives a constructive possession of the whole tract, if not in any adverse possession; although there may be no fence or inclosure round the ambit of the tract, and an actual residence only on a part of it; to constitute actual possession, it is not necessary that there should be any fence or inclosure of the land. *Id.*
4. Where there has been an entry on land, under color of title, by deed, the possession is

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- deemed to extend to the bounds of that deed; although the actual settlement and improvements were on a small parcel only of the tract; in such a case, where there is no adverse possession, the law construes the entry to be co-extensive with the grant to the party; upon the ground, that it is his clear intention to assert such possession.....*Id.*
4. The demandants in a writ of right claimed adversely to all the tenants, upon a title independent and distinct from theirs; the tenants all claimed under an adverse title by deed for 7000 acres; that is, under a title common to them all. The demandants could not recover any of the tract in controversy, unless they were seized thereof within thirty years the period prescribed by the statute of limitations for writs of right; if, therefore, there had been thirty years adverse possession of the particular tract in controversy, by any of the tenants, the demandants failed in their suit, and were debarred from any recovery.....*Id.*
5. The court instructed the jury, that if they should find that the patent for the land, under which the title of the tenants was derived, did not cover all the land; yet if they find from the evidence, that the tenants, or any of them, or those claiming under them, had had possession of the land in contest, for thirty years next before the commencement of the demandants' suit, they must find for the tenants.....*Id.*
- PRACTICE.
1. The death of the appellee having been suggested, and the counsel for the executor of the appellee having offered to enter his appearance for the executor, the court sustained a motion to dismiss the cause, as no person appeared to prosecute the suit. *Hooke v. Linton*.....*107
2. Although a *venire de novo* is frequently awarded by a court of errors, upon a bill of exceptions, to enable parties to amend; and although amendments may, in the sound discretion of the court, upon a new trial, be permitted; the *venire de novo* is, in no instance, anything more than an order for a new trial, in a cause in which the verdict or judgment is erroneous in matter of law; and is never "equivalent to a new suit;" no statute of the United States alters the law in this regard. *United States v. Hawkins*.....*125
3. Generally speaking, all joint obligors, and other persons bound by covenants, contract, or *quasi* contract, ought to be made parties to the suit; and the plaintiff may be compelled to join them all, by a plea in abatement for the non-joinder; but such an objec-
- tion can only be taken advantage of by a plea in abatement; for if one party only is sued, it is not matter in bar of the suit, or in arrest of judgment upon the finding of the jury, or of variance in evidence upon the trial. But the same doctrine does not appear to have been acted upon, to the full extent, in cases of recognisance and judgments, and other matters of record, such as bonds to the crown; if, in cases of this sort, it appears by the declaration, or other pleadings, that there is another joint-debtor who is not sued, although it is not averred, that he is living; the objection need not be pleaded in abatement, but it may be taken advantage of upon demurrer, or in arrest of judgment. *Gilman v. Rives*.....*298
4. A judgment that a declaration is bad in substance (which alone, and not matter of form, is the ground of a general demurrer), can never be pleaded as a bar to a good declaration for the same cause of action; the judgment is in no just sense a judgment upon the merits.....*Id.*
5. The transcript of the record had been lodged by the plaintiffs in error, with the clerk of the court, on the 24th of October 1835; who refused to file it, or docket the cause, until the plaintiffs had given the fee-bond, in pursuance of the 87th rule of the court; the counsel for the plaintiffs in error moved to have the transcript filed and docketed; alleging they had done all the law required, to be done in order to bring the case before this court. On the part of the defendant in error, his counsel filed and read in open court, certified copies of the writ of error, citation, and appeal bond, and of the judgment of the circuit court; and having stated that the plaintiffs in error had failed to have the case docketed, according to the 80th rule of the court, they moved to have the case docketed and dismissed. The court overruled the motion to docket and dismiss the cause, and also the motion to have the transcript filed, and the cause docketed without the fee-bond being first given. These motions were overruled on the 18th of January 1836; and the court allowed the plaintiffs in error until the 1st day of March following to give the clerk the fee-bond; on the failure so to give the same, the writ of error to be dismissed. *Owings v. Tiernan*.....*447

See CHANCERY AND CHANCERY PRACTICE.

PRINCIPAL AND AGENT.

1. It is the settled doctrine of the law, that where money is illegally demanded and received by an agent, he cannot exonerate him.

- self from personal responsibility, by paying it over to his principal, when he has had notice not to pay it over. *Elliott v. Swartzwold*. *187

PRINCIPAL AND SURETY.

1. When principal and surety are bound jointly and severally, although there is no express averment on the face of the instrument, that all are principals, yet the surety cannot aver by pleading, that he is surety only. *Spring v. Bank of Mount Pleasant*. *257
2. When one who is, in reality, only surety, is willing to place himself in the situation of principal, by expressly declaring upon his contract, that he binds himself as such, there cannot be any hardship in holding him to the character in which he assumes to place himself; as to that particular contract, he undertakes as a partner with the debtor; and has no more right to disclaim the character of principal, than the creditor has to treat him as principal, if he had set out in the obligation, that he was only surety. *Id.*
3. Extending to a principal further time for payment, will discharge a surety. *Id.*

PRIORITY OF THE UNITED STATES.

1. The priority of the United States for the payment of debts due to them by an insolvent debtor, or by the estate of a deceased debtor, does not extend to effect the loss of an incorporated bank on the stock held by one indebted to the bank, when, by the charter of the bank, it is provided that no transfer of the stock of any one indebted to the bank, shall be made, before the debt due by a stockholder of the bank shall be paid. *Brown v. Bank of Washington*. *596
2. It has been the uniform construction of the fifth section of the act of 1797, and of the similar provision in the 66th section of the collection act of 1799, that, whether in a case of insolvency, death or assignment, the property of the debtor passes to the assignee, executor or administrator; the priority of the United States operating, not to prevent the transmission of the property, but giving them a preference in payment out of the proceeds. *Id.*
3. The preference is in the appropriation of the debtor's estate; so that if, before it has attached, the debtor has conveyed or mortgaged his property, or it has been transferred in the ordinary course of business, neither are over-reached by the statutes; and it has never been decided, that it affects any lien, general or specific, existing when the event

took place which gave the United States a claim of priority. *Id.*

4. Another rule is settled by the cases; that the priority does not attach to property legally transferred to a creditor on respondeat, though he may hold it subject to an account, equity, or trust for the borrower; such transfer will be protected against the United States, though not an out and out sale in the course of business, so as to divest the equitable as well as the legal interest of the party. *Id.*

PROTEST OF BILLS.

1. A bill of exchange, drawn in one state of the Union, on a person in another, is a foreign bill of exchange, and to be treated as such. *Dickins v. Beal*. *572
2. What will be due diligence in giving notice of the protest of a bill of exchange. *Id.*
3. Evidence of the protest of a bill of exchange. *Id.*

PUBLIC HIGHWAY.

1. Under certain acts of the legislature of Massachusetts, and the proceedings of the town of Charlestown, Massachusetts, certain streets were laid out; the United States purchased, for a navy-yard, the ground through which the streets passed, and closed up the streets, discontinuing the use of them, and using the ground over which they passed as part of the navy-yard; the original owners claimed the ground, on the allegation that it reverted to them, the uses for which it had been appropriated having ceased. The court held, that the right of the owners of the freehold was not barred by the act of the legislature of Massachusetts of the 30th of October 1771; the law in Massachusetts is well settled, that where a mere easement is taken for a public highway, the soil and freehold remain in the owner of the land, incumbered only with the easement; and that, upon the discontinuance of the highway, the soil and freehold revert to the owner of the land. *Harris v. Elliott*. *25

PUBLIC OFFICERS.

1. A bond given by a paymaster, to execute the duties of his office faithfully, the condition of which did not in its very terms conform to the law of the United States, but which required no duties to be performed which were not in conformity with the duties of his office, is valid. *United States v. Bradley*. *312

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2. Where a ministerial officer acts in good faith, he is not liable to exemplary damages for an injury done; but he can claim no further exemption, where his acts are clearly against law. *Tracy v. Swartwout*..... *80
3. Some personal inconvenience may be experienced by an officer who shall be held responsible in damages, for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship..... *Id.*
4. A collector of the revenue is not personally liable, in an action to recover back an excess of duties paid, as collector, and by him, to him, in the regular or ordinary course of his duty, paid into the treasury of the United States; he, the collector, acting in good faith, and under instructions from the treasury department, and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount, given him: otherwise, if notice had been given. *Elliott v. Swartwout*..... *187

See COLLECTOR OF DUTIES.

PURCHASERS.

1. A purchaser with notice may protect himself under a purchaser by deed, without notice, but cannot do it by purchase from one who holds or claims by contract only. *Boone v. Chiles*..... *177
2. A *bond fide* purchaser, without notice, is an especial favorite in courts of equity..... *Id.*
3. Proceedings in equity against a *bond fide* purchaser, without notice, by the holder of the superior title..... *Id.*
4. Principles of law applicable to such purchasers..... *Id.*

RECORDING OF DEEDS.

1. Construction of the acts of the legislatures of North Carolina and Tennessee, relative to registering and according deeds for lands in Tennessee, in force in the state of Tennessee. *Davis v. Reid*..... *524

RHODE ISLAND.

See CONSTITUTIONALITY OF STATE LAWS:
Leland v. Wilkinson, *194.

RIPARIAN RIGHTS.

1. The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still

hold the same boundary, including the accumulated soil; no other rule can be applied, on just principles; every proprietor whose land is thus bounded, is subject to loss, by the same means which may add to his territory: and as he is also without remedy for his loss in this way, he cannot be held accountable for his gain; this rule is no less just when applied to public, than to private rights. *New Orleans v. United States*..... *662

RULES OF COURT.

1. Construction of the rule relative to the docketing and dismissing causes, passed at January term 1835. *Owings v. Tierman*..... *24

SALES FOR PAYMENT OF DEBTS

1. David Peter, of the district of Columbia, by his will, declared it to be his intention, that all the proceeds of all his estate should be vested in his wife, for her support and for the maintenance and education of his children; that no appraisement or valuation should be had of any part of the property attached to his dwelling-house; that his children should receive good educations; he provided for the payment of his debts, by the following clause in his will: "I wish all my debts to be as speedily paid as possible, for which purpose I desire, that the tract of land on which Dulin lives, together with all personal property thereon, may be sold and applied to that purpose; and in aid of that, as soon as sales can be effected, so much of my city property as may be necessary to effect that object;" he appointed his wife, Johns and George Peter, his executors. The whole of the personal property attached to the dwelling-house, went into the hands of Mrs. Peter; and she maintained her family, and educated her children, out of the proceeds of the estate; at the time of the decease of David Peter, he was largely indebted to the banks in the district of Columbia; and the executors, to obtain a continuance of the loans, and considering it advantageous to the estate to do so, gave their individual notes for the debts, and received the notes of their testator; this was done, under the understanding that the arrangement was to continue so long as the banks should be willing to indulge the estate; or until the executors could make sales of the estate for the payment of the debts; in the settlement of the accounts of the executors, in the orphans' court, the notes of the testator, received from the banks, were charged by the executors

The Dulin farm was sold, but no title made to the purchaser, he having paid a part of the purchase-money, and given his notes, indorsed, for the balance ; his notes were not paid, and an ejectment was brought for the recovery of the estate, which had not been decided. George Peter survived the other executors ; and he was called upon by the banks to sell the real estate of David Peter, directed to be sold to pay the debts ; the children of David Peter obtained a perpetual injunction of the circuit court to prevent the sale of the city property of their father, for the payment of the debts ; alleging that no debts were due, as the notes of the executors had been received by the banks for the debts of the testator, and they had charged them in their accounts with the estate ; and also alleging negligence in not collecting the balance due for the sale of "the Dulin farm ;" and that the executors were liable as for a *devisoratus*, for the money which went into the hands of their mother, for the support of the family, and the education of the children ; and it was denied, that the power to sell the estate of the testator survived, to the surviving executor, George Peter. The court held, that the direction of the will of David Peter to sell a portion of his real estate for payment for his debts, created a power coupled with an interest, that survived ; that the surviving executor was, by necessary implication, the person authorized to execute that power and fulfil that trust ; that the debt due the banks had not been extinguished, by the notes substituted by the executors, as renewals in the bank, nor the estate of the testator in any way discharged from the payment of the debt ; that the executors were not chargeable with negligence, or misapplication of the personal estate, that ought to render them personally responsible for these debts ; and that satisfaction of these debts should be had out of the lands appropriated by the testator for that purpose. The perpetual injunction granted by the circuit court was ordered to be dissolved.
Peter v. Beverly. *532

2. The general principle of the common law, as laid down by Lord Coke, and sanctioned by many judicial decisions, is, that when a power given to several persons, is a mere naked power to sell, not coupled with an interest, it must be executed by all, and does not survive ; but where the power is coupled with an interest, it may be executed by the survivor. It is not a power coupled with an interest, in executors, because they may derive a personal benefit from the devise ; for a trust will survive, though no way beneficial to the trustee ; it is the possession of the

legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question ; and when an executor, guardian or other trustee, is invested with the rents and profits of land for the sale or use of another, it is still an authority coupled with an interest, and survives. . . . *Id.*

3. The courts of America have generally applied to the construction of such powers, the great and leading principle which applies the construction of other parts of the will, to ascertain and carry into execution the intention of the testator. When the power is given to executors, to be executed in their official capacity of executors, and there are no words in the will, warranting the conclusion that the testator intended, for safety, or some other object, a joint execution of the power ; as the office survives, the power ought also to be construed as surviving. And courts of equity will lend their aid to uphold the power, for the purpose of carrying into execution the intention of the testator, and preventing the consequences that might result from an extinction of the power ; and where there is a trust, charged upon the executors, in the direction given to them in the disposition of the proceeds, it is the settled doctrine of courts of chancery, that the trust does not become extinct, by the death of one of the trustees ; it will be continued in the survivors, and will not be permitted, in any event to fail, for the want of a trustee. *Id.*

SALVAGE.

1. The brig Hope, with a valuable cargo, had been conducted, in the evening, by a pilot, inside of Mobile point, where pilots of the outer harbor usually leave vessels which they pilot inside of that bar ; the pilot was discharged, and the Hope proceeded up the bay of Mobile ; the wind soon after changed, blew a violent gale from the north-west, both anchors parted, and the Hope was driven on a shoal, outside of the point, among the east breakers ; the gale increased to a hurricane, and forced the vessel on her beam-ends, and her masts and bowsprit were cut away ; the master and crew deserted her, to save their lives. After various fruitless efforts to save her, the libellants, all pilots of the outer harbor of Mobile, two days after she was stranded, and while yet in great peril, succeeded ; and she was brought up to the city of Mobile by them, towed by their pilot boat, assisted by a steam-boat employed by them. On a libel for salvage, the district court of the United States for the district of Alabama allowed, as salvage, one third of \$15,299.58 ; the appraised value of the brig and cargo ;

- the owners of the brig and cargo appealed to this court. *The Hope*. *108
2. The amount of salvage allowed by the district court was certainly not, under the circumstances of the case, unreasonable; this court is not in the habit of revising such decrees as to the amount of salvage, unless upon some clear and palpable mistake, or gross allowance of the court below. It is equally against sound policy and public convenience, to encourage appeals of this sort in matters of discretion; unless there has been some violation of the just principles which ought to regulate the subject. *Id.*
3. The jurisdiction of the district courts of the United States, in cases of admiralty and maritime jurisdiction, is not ousted by the adoption of the state laws by the act of congress; the only effect, to leave the jurisdiction concurrent in the state courts; and, if the party should sue in the admiralty, to limit his recovery to the same precise sum to which he would be entitled under the state laws, adopted by congress, if he should sue in the state courts. *Id.*
4. A pilot, while acting within the strict line of his duty, however he may entitle himself to extraordinary pilotage compensation for extraordinary services, as contradistinguished from ordinary pilotage for ordinary services, cannot be entitled to claim salvage; in this respect, he is not distinguished from any other officer, public or private, acting within the appropriate sphere of his duty. But a pilot, as such, is not disabled, in virtue of his office, from becoming a salvor; on the contrary, whenever he performs salvage services beyond the line of his appropriate duties or under circumstances to which those duties do not justly attach, he stands in the same relation to the property as any other salvor; that is, with a title to compensation to the extent of the merit of his services, viewed in the light of a liberal public policy. *Id.*
5. Seamen, in the ordinary course of things, in the performance of their duties, are not allowed to become salvors, whatever may have been the peril, or hardships, or gallantry of their services, in saving the ship and cargo; extraordinary events may occur, in which their connection with the ship may be dissolved *de facto*, or by operation of law; or they may exceed their proper duty, in which case, they may be permitted to claim as salvors. *Id.*
6. It is not within the scope of the positive duties of a pilot, to go to the rescue of a wrecked vessel, and employ himself in saving her or her cargo, when she is wholly unnavigable; that is a duty entirely distinct in its nature, and no more belonging to a pilot than it would be to supply such a vessel with masts or sails, or to employ lighters to discharge her cargo, in order to float her. It is properly a salvage service, involving duties and responsibilities, for which his employment may peculiarly fit him; but yet, in no sense, including in the duty of navigating the ship. *Id.*
7. This was a case where the libellants acted as salvors, and not as pilots; they had, at the time, no particular relation to the distressed ship; they proffered useful services as volunteers, without any pre-existing covenant that connected them with the duty of employing themselves for her preservation; the duties they undertook were far beyond any belonging to pilots, and precisely those belonging to salvors. *Id.*

SPANISH GRANTS IN LOUISIANA.

1. A concession and survey of land in Missouri, which was granted by the lieutenant-governor of Upper Louisiana, before the treaty of Louisiana, confirmed; so far as the land embraced in the same has not been sold by the United States. For the quantity of land so sold, the owners of the concession may enter a like quantity in any land-office in Missouri, after the same has been offered for sale. *Soulard v. United States*. *100
2. Where no survey was made, under a grant of land in Louisiana, which had been given by the proper authorities of Spain, before the cession of Louisiana, and no special description of the land given in the grant, so that it was clearly designated and set apart from the royal domain; the grant was not valid as against the United States. *John Smith T. v. United States* *826
3. The principles which have been established by the decisions of the court, in relation to claims to lands under grants from the crown of Spain, or the officers of Spain authorized to make grants. *Id.*
4. The act of congress of 1804, which submitted claims to land in Louisiana to judicial cognisance, confined the court to such claims as had been legally made, granted or issued, before the 10th of March 1804, which were protected by the treaty of 1803, and might have been perfected into a complete title, under the laws, usages and customs of Spain, if she had continued to hold the government of the province. *Id.*
5. The laws of the United States give no authority to an individual to survey his grant or claim to lands; he may make lines to designate the extent and boundaries of his claim, but he can acquire no rights thereby. *Id.*

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TAX-SALES.

1. The law of Pennsylvania, authorizing the redemption of lands sold for taxes, ought to receive a liberal and benign construction in favor of those whose estates would be otherwise divested; especially, where the time allowed is short, an ample indemnity given to the purchaser, and a penalty is imposed on the owner. The purchaser suffers no loss; he buys with full knowledge that his title cannot be absolute for two years; if it is defeated by redemption, it reverts to the lawful proprietors. *Dubois v. Hepburn*....¹
2. It would seem not to be necessary for the purposes of justice, or to effectuate the objects of the law, that the right to redeem should be narrowed down by a strict construction.....*Id.*
3. It comports with the words and spirit of the law, to consider any person who has an interest in land sold for taxes, as the owner thereof, for the purposes of redemption. *Id.*
4. Any right which, in law or equity, amounts to an ownership in the land, any right of entry upon it, to its possession or enjoyment, or any part of it, which can be deemed an estate in it; makes the person the owner, so far as it is necessary to give him the right to redeem.....*Id.*
5. The law does not require a payment or tender; an offer and refusal is made equivalent to a receipt of the money by the treasurer, and authorizes a recovery of the land by suit, as if no sale had been made.....*Id.*

TRADITION AND REPUTATION.

1. When evidence. *Ellicott v. Pearl*....^{*112}

TRUSTEE AND CESTUI QUE TRUST.

1. Time does not bar a direct trust, as between trustee and *cestui que trust*, till it is disavowed; as, where a constructive trust is made out in equity, time protects the trustee, though his conduct was originally fraudulent, and his purchase would have been repudiated for fraud; so, where a party takes possession in his own right, and was *prima facie* the owner, and is turned into a trustee by matter of evidence merely; and where one intending to purchase the entire interest in the land, took a conveyance, without words of limitation to his heirs, passing only as an estate for life, the lapse of fourteen years after the expiration of the life-estate, was a

- protection to the heirs of the purchaser.
Boone v. Chiles.....^{*177}
2. What that reasonable time is, within which a constructive trust can be enforced, depends on the circumstances of the case; but there can be few cases where it can be done, after twenty years' peaceable possession, by the person who claims in his own right, but whose acts have made him a trustee by implication.....*Id.*

USURY.

1. Construction of the statute of Virginia against usury. *Brown v. Swann*.....^{*497}

VENIRE DE NOVO.

1. Although a *venire de novo* is frequently awarded by a court of error, upon a bill of exceptions, to enable parties to amend, and though amendments may, in the sound discretion of the court, upon a new trial, be permitted; the *venire de novo* is, in no instance, anything more than an order for a new trial, in a cause in which the verdict or judgment is erroneous in matter of law; and is never "equivalent to a new suit;" no statute of the United States alters the law in this regard. *United States v. Hawkins*....^{*125}

VOLUNTARY BONDS.

See *United States v. Bradley*, *343.

WILL.

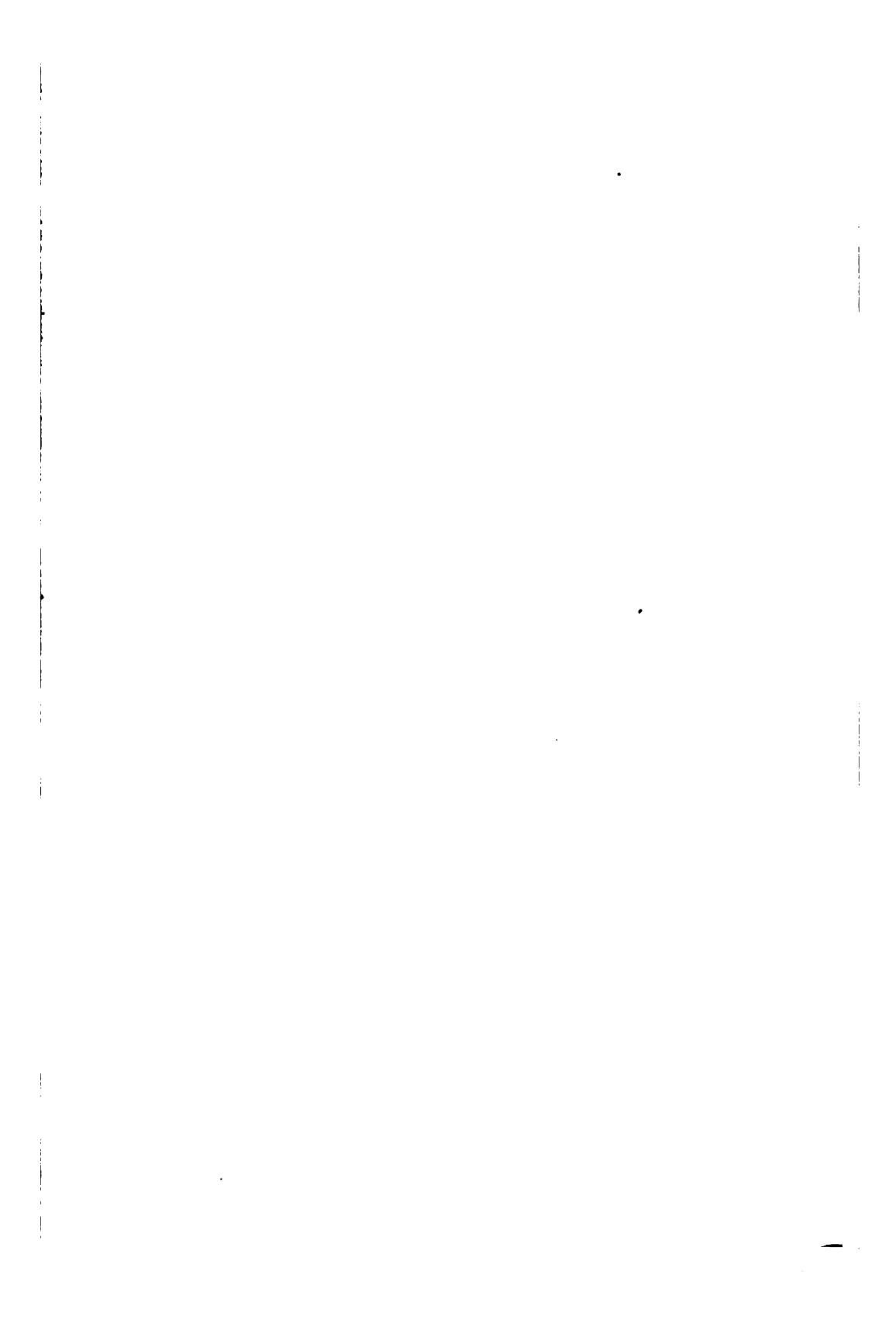
1. When a power given by will, to executors, to sell real estate for the payment of the debts of a testator, survives, and may be exercised by a surviving executor. *Peter v. Beverly*.....^{*582}

WRIT OF ERROR.

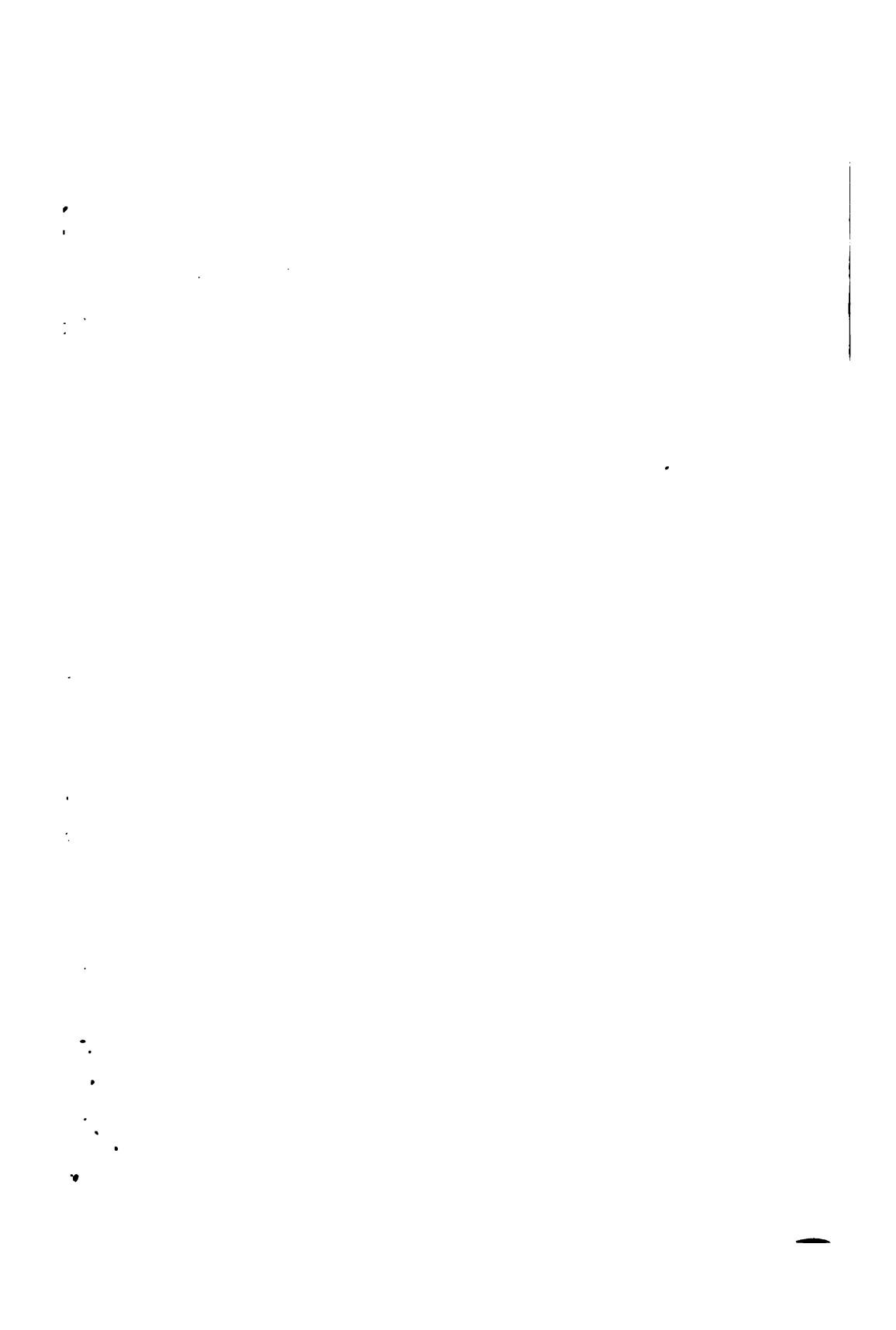
1. Where the court charged the jury, that the defendant was entitled to no more than nominal damages, in an action against the collector of the port of New York, for detaining goods, until they had greatly deteriorated, under a claim for higher duties than they were legally liable to pay, and the jury gave the plaintiff no more than nominal damages; it was held, that a writ of error would lie for the plaintiff, to revise the opinion of the court. *Tracy v. Swartwout*....^{*80}

See JURISDICTION: *Hagan v. Poison*, *160.











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